Applicant Details

First Name	**Matthew**
Last Name	**Shalna**
Citizenship Status	**U. S. Citizen**
Email Address	**mxs2972@miami.edu**
Address	**Address** Street **27743 Sky Lake Circle** City **Wesley Chapel** State/Territory **Florida** Zip **33544**
Contact Phone Number	**6175134004**

Applicant Education

BA/BS From	**University of Central Florida**
Date of BA/BS	**December 2019**
JD/LLB From	**University of Miami School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=51003&yr=2013**
Date of JD/LLB	**May 10, 2023**
Class Rank	**33%**
Law Review/ Journal	**Yes**
Journal(s)	**University of Miami Business Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Executive Vice President of Charles C. Papy, Jr. Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Redmond, Patricia
predmond@stearnsweaver.com
305-789-3534

Torres, Edwin G.
edwin_g_torres@flsd.uscourts.gov
3055235750

This applicant has certified that all data entered in this profile and any application documents are true and correct.

6600 SW 57th Avenue, Apt. D-205
South Miami, FL 33143
617-513-4004
Mxs2972@miami.edu

May 24, 2023

The Honorable Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street, Courtroom 14-B
Philadelphia, PA 19106

Dear Chief Judge Sanchez:

I am writing to apply for a 2024-25 term clerkship in your chambers. I graduated from the University of Miami School of Law *cum laude* in May 2023 and, after the bar exam, will serve as a litigation associate for Fowler White Burnett, P.A. After visiting Philadelphia last May, I became enthralled with the city's culture, history, and unique personality. Further, as a former Fellow at the University of Miami's Center for Ethics and Public Service, I aspire to clerk for a judge with a steadfast commitment to increasing diversity and fairness.

I believe my experiences have equipped me well to serve as your judicial law clerk. I began working at a Chinese restaurant at the age of fifteen and continued working at restaurants—including coffee shops, cafes, and a pizzeria—through high school and college. Establishing work habits early in life allowed me to become responsible, accountable, and a fast learner.

Moreover, in law school, I have had the privilege of pursuing tremendous learning opportunities. In Spring 2022, I served as an intern to the Honorable Jonathan Goodman. I drafted numerous reports and recommendations, observed hearings, and obtained insight on the day-to-day activities of judicial law clerks. I had several more writing opportunities while interning for the Honorable Adalberto Jordan, which included drafting an opinion for a Title VII case and drafting bench memoranda to help prepare Judge Jordan for oral arguments. Additionally, serving as a Fellow for the Center for Ethics and Public Service allowed me to organize student-centered panels predicated on diversity and inclusion. I also co-authored a published ABA article, which discusses the interplay between implicit gender bias and the Model Rules of Professional Conduct.

I would sincerely appreciate an opportunity to discuss my candidacy at your convenience. Please find included my resume, law school transcript, a writing sample, and letters of recommendation from Professor Patricia Redmond and the Honorable Edwin G. Torres. Thank you for your time and consideration and I look forward to hearing from you.

Respectfully,

Matthew Shalna

Matthew Shalna

Matthew Shalna
Miami, FL 33143 | 617-513-4004 | mxs2972@miami.edu

EDUCATION:

University of Miami School of Law, Coral Gables, FL
Juris Doctor Candidate, May 2023
GPA: 3.614/4.000 (Top 30%; *Cum Laude*)
Law Review: *University of Miami Business Law Review* (abstract published in *Business Law Today*)
Moot Court: Charles C. Papy, Jr. Moot Court Board (Executive Vice President)
E. Earle Zehmer National Moot Court Competition (Semi-Finalist; Runner-Up Best Brief)
Robert F. Wagner National Labor and Employment Law Moot Court Competition (Quarter-Finalist; Best Preliminary Round Team Award out of forty teams)
Honors: Dean's List
Dean's Merit Scholarship
Activities: Research Assistant, Vice Dean Andrew B. Dawson, March 2021 – August 2021
First-Generation Law Student Association

University of Central Florida, Orlando, FL
Bachelor of Arts in Philosophy and Bachelor of Science in Political Science, December 2019
GPA: 3.712/4.000
Honors: Philosophy Department Academic Excellence Award
Political Science Honors Society, *President*
Competitions: APPE Intercollegiate Ethics Bowl (selected to compete and advanced to National Championship)

EXPERIENCE:

United States Court of Appeals for the Eleventh Circuit, Miami, FL
Judicial Extern for the Honorable Adalberto Jordan, United States Circuit Judge, January 2023 – April 2023
Drafted opinions and legal memoranda. Performed extensive legal research regarding civil and criminal issues, including bankruptcy, Title VII, vacatur under the Administrative Procedure Act, and arbitration. Observed oral arguments.

Fowler White Burnett, P.A., Miami, FL
Law Clerk, May 2022 – December 2022 (Post-graduation offer accepted)
Commercial litigation practice group. Drafted motions, answers, counterclaims, complaints, subpoenas, and legal memoranda. Observed depositions and hearings, performed legal research, and assisted in trial preparation (including drafting cross-examination questions and organizing witness information).

United States District Court, Southern District of Florida, Miami, FL
Judicial Extern for the Honorable Jonathan Goodman, Magistrate Judge, January 2022 – April 2022
Performed extensive legal research regarding civil law issues, including the right to costs and contractual rights and obligations. Attended judicial proceedings. Drafted memoranda, orders, and reports and recommendations.

Center for Ethics and Public Service, University of Miami School of Law, Coral Gables, FL
Steven Chaykin Fellow, January 2021 – May 2022
Led a team of six Interns and Fellows in weekly meetings. Wrote legal memoranda. Coordinated CLE trainings with federal judges, state judges, and Bar organizations. Organized and moderated award ceremonies and panel events.

The Campbell Legal Group P.L.L.C., Coral Gables, FL
Law Clerk, June 2021 – August 2021
Drafted complaint for Ponzi scheme litigation. Researched, located, and organized information pertaining to the mortgages, deeds, liens, and records of the defendant's thirteen entities.

INTERESTS:

Cooking (seven years restaurant experience); avid Boston sports fan

54455736 Sex
Student ID

Shalna, Matthew
6600 SW 57th Ave
Apt. D-205
South Miami, FL 33143

UNIVERSITY OF MIAMI

MIAMI

CORAL GABLES, FLORIDA 33124

04/05/2023

Academic Program

School of Law
Active in Program
Law

Beginning of Law Record

Fall 2020

UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 11	CIVIL PROCEDURE I Anthony Alfieri	3.000	A	12.000
LAW 14	PROPERTY Andres Sawicki	4.000	B+	13.200
LAW 15	TORTS Zanita Fenton	4.000	C+	9.200
LAW 19	LEGAL COMM & RSCH I Christie Anne Darias Daniels	2.000	B-	5.400

			Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.062	UM Semester Totals	13.000	13.000	39.800
UM Cumulative GPA	3.062	UM Cumulative Totals	13.000	13.000	39.800

Spring 2021

UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 12	CONTRACTS Andrew Dawson	4.000	A	16.000
LAW 16	CRIMINAL PROCEDURE Scott Sundby	3.000	A-	11.100
LAW 17	U.S CONST LAW I Frances Hill	4.000	A-	14.800
LAW 29	LEGAL COMM & RSCH II Shara Kobetz Pelz	2.000	B+	6.600
LAW 297	LAW PRACTICE: SYSTEMIC ADV Francisco Valdes	3.000	A	12.000

			Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.781	UM Semester Totals	16.000	16.000	60.500
UM Cumulative GPA	3.459	UM Cumulative Totals	29.000	29.000	100.300

Term Honor: DEAN'S LIST

Fall 2021

UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 110	BANKRUPTCY Patricia Redmond	3.000	A	12.000
LAW 202	EMPLOYMENT DISCRIMIN Donald Papy	3.000	A	12.000
LAW 208	EVIDENCE Ricardo Bascuas	4.000	B+	13.200
LAW 700	ADVANCED APPELLATE ADVOCACY I Harvey Sepler	2.000	S	0.000
LAW 896	EXTERNSHIP I Jessi Tamayo	3.000	S	0.000

			Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.720	UM Semester Totals	15.000	10.000	37.200
UM Cumulative GPA	3.526	UM Cumulative Totals	44.000	39.000	137.500

Spring 2022

UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 702	ADVANCED APPELLATE ADVOCACY II Harvey Sepler	2.000	S	0.000
LAW 707	SPECIAL TOPICS IN FED COURTS Adalberto Jordan Diana Jordan Zamora	2.000	A	8.000
LAW 780	LITIGATION SKILLS I: PRETRIAL Jeannie Jontiff	3.000	S	0.000
LAW 816	BUSINESS LAW REVIEW Andrew Elmore	2.000	A-	7.400
LAW 880	LITIGATION I: TRIAL Jeannie Jontiff	3.000	S	0.000
LAW 897	EXTERNSHIP II Jessi Tamayo	3.000	S	0.000

			Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.850	UM Semester Totals	15.000	4.000	15.400
UM Cumulative GPA	3.556	UM Cumulative Totals	59.000	43.000	152.900

Fall 2022

UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 100	BUSINESS ASSOCIATION Andrew Dawson	4.000	S	0.000
LAW 132	TRADEMARK LAW Jaime Rich	2.000	A-	7.400
LAW 332	CRIM PRO ADJUDICAT Scott Sundby	3.000	A	12.000
LAW 406	PROF RESPONSIBILTY Jessi Tamayo	3.000	A	12.000
LAW 876	LITIGATION II: CRIMINAL LITIG	3.000	S	0.000

			Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.925	UM Semester Totals	15.000	8.000	31.400

54455736 Sex
Student ID

04/05/2023

Shalna, Matthew
6600 SW 57th Ave
Apt. D-205
South Miami, FL 33143

UNIVERSITY OF MIAMI

MIAMI

CORAL GABLES, FLORIDA 33124

UM Cumulative GPA	3.614	UM Cumulative Totals	74.000	51.000	184.300

Spring 2023

UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 106	TRUSTS & ESTATES William Muir	4.000	IP	0.000
LAW 534	TOPICS IN FLORIDA PRACTICE Steven Maxwell	2.000	IP	0.000
LAW 749	REORGANIZATION IN BANKRUPTCY Patricia Redmond	2.000	IP	0.000
LAW 751	BUSINESS AND HUMAN RIGHTS Marcia Narine Weldon	3.000	IP	0.000
LAW 898	EXTERNSHIP III Jessi Tamayo	3.000	IP	0.000

			Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	0.000	UM Semester Totals	0.000	0.000	0.000
UM Cumulative GPA	3.614	UM Cumulative Totals	74.000	51.000	184.300

Law Career Totals

			Earned Credits	Graded Credits	Qty Pts
UM Cumulative GPA	3.614	UM Cumulative Totals	74.000	51.000	184.300
		Cumulative Transfer Totals	0.000		
		Cumulative Combined Totals	74.000		

End of Law

STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A.

Patricia A. Redmond
150 West Flagler Street, Suite 2200
Miami, FL 33130
Direct: (305) 789-3553
Fax: (305) 789-2656
Email: predmond@stearnsweaver.com

Re: Recommendation of Matthew Shalna

Dear Your Honor:

It is a pleasure and privilege to write a letter of recommendation for Matthew Shalna for the position of judicial law clerk. I am an adjunct professor of law at the University of Miami School of Law and met Mr. Shalna when he enrolled in my basic bankruptcy class last Fall semester. In class, he was a leader of his colleagues and an exceptional legal analyst. Mr. Shalna was always prepared and asked the hard questions that benefited the other students. He received an "A" in the class, which is difficult to attain.

In addition, Mr. Shalna was one of the students directly charged with writing the fact pattern and ethical analysis for the Bankruptcy Bar ethics training though the Center for Ethics and Public Interest (CEPS). The issues were difficult for experienced lawyers to understand. Mr. Shalna studied the existing case law and the tension with ethical rules and developed an extraordinary hypothetical dealing with bifurcation of fees in consumer cases. Thereafter, he drafted another high quality case study with respect to ethical issues raised by non-debtor releases in the wake of the Purdue Pharma case.

I whole-heartedly recommend Mr. Shalna for the position of judicial law clerk.

If you have questions or need additional information, please do not hesitate to contact me.

Best regards,

Patricia A. Redmond, Esq.

PAR:jm

#10384247 v1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Edwin G. Torres
United States Magistrate Judge

99 Northeast Fourth Street, Room 1027
Miami, Florida 33132
(305) 523-5750

Judge,

I am the Chief Magistrate Judge serving in the Southern District of Florida. I am writing to support the application of Matthew Shalna for a law clerk position in your Chambers. My experience with Matthew is a limited one, which would ordinarily be reason enough to discount my recommendation. But let me explain why this may be the exception to the rule.

I am an adjunct professor at the University of Miami School of Law. I also contribute regularly to the moot court program. This year I was asked to co-coach the Wagner team with my wife, a professor at the law school. Matthew and another student were our student competitors who participated in the competition, sponsored by New York Law School. The problem involved interesting and complex labor and employment issues. Matthew was responsible for two of them. My wife and I agree that our experience with Matthew and this team was the most rewarding moot court experience we have had while at the law school. By far, Matthew and his partner were our best students. But apart from their quarter-final success in the competition itself, the more valuable experience for us was getting to work with and know Matthew during the intense one-month period leading up to the event.

I met Matthew at our first strategy meeting after the brief was submitted. I can say with certainty that I have never had a student tackle his issues and challenges with such vigor. Matthew was instantly impressive, demonstrating how much time he devoted to analyzing his part of the problem and studying the many different cases that could be useful or relevant. He considered every nuance and pursued every angle. He was so thorough and dedicated that I worried he would burn out before we ever got to New York. Matthew proved me wrong, however, because he excelled at each meeting and practice round. And by the time of the competition itself, he was at the top of his game. Even after a stellar round during the competition, he continued crafting his argument and perfecting his analysis.

With respect to his moot court skills, Matthew was simply remarkable. I cannot remember a student argue every practice round without notes yet with such precision. That was also on display during the competition itself.

For a Judge's Chambers, perhaps his most notable traits are his good judgment, character, and professional maturity. He is also an absolute pleasure to work with. He is obviously smart, yet he does not wear it on his sleeve. He is humble (perhaps to a fault). And most importantly you instantly see how kind and thoughtful he is. Matthew is a very impressive young man, and I am very glad I had a chance to meet him and work with him during this period.

I learned that he has decided to move away from Miami for family reasons and is very interested in the clerkship position open in your Chambers. Without reservation, I would encourage you to meet Matthew and strongly consider him for your position. I have told him that if he ever wants to return to Miami and needs a landing place, my Chambers should be at the top of his list. But he seems sincere in his interest in returning to his home area and working for you. If selected, he will surely become one of your best ever law clerks.

I do not often write letters like this for students I encounter. But Matthew is special. If I can provide any more information, please feel free to contact me directly.

Writing Sample

I prepared this appellate brief (only my individual argument section is included) while competing in the E. Earle Zehmer National Moot Court Competition. The case involved a claimant who was injured while performing gymnastics for a circus. The claimant was sent to perform for the circus through a contract between the Chinese government, the United States government, and the circus. After suffering an injury on his first day of practice, the claimant sued the circus for workers' compensation benefits. The Judge of Compensation Claims found in favor of the claimant.

On appeal, my partner and I represented the circus. We were each assigned one issue to analyze and wrote our argument sections individually. I analyzed whether the claimant was an independent contractor or an employee. I argued that he was an independent contractor, and therefore not entitled to workers' compensation benefits.

We won the "Second Best Brief" award. The writing sample is in its original format.

ARGUMENT

I. Claimant is an independent contractor and therefore not entitled to worker's compensation benefits.

The JCC's order on review should be reversed because the record lacks substantial, competent evidence that the Circus exercised control over the manner in which Claimant performed his work. Accordingly, Claimant is an independent contractor.

A. Standard of review

Whether one is an employee or an independent contractor is a question of fact which must be supported by substantial competent evidence. *See Adams v. Wagner*, 129 So. 2d 129, 131 (Fla. 1961).

B. Claimant is an independent contractor because the Circus did not exercise control over the manner in which he performed his work.

Florida law provides that while employees are entitled to workers' compensation benefits, independent contractors are not. *See Edwards v. Caulfield*, 560 So. 2d 364, 369 (Fla. 1st DCA 1990) (noting that "Workers' Compensation Law excludes 'independent contractors' . . . and thereby excludes them from required coverage under the act"). The Workers' Compensation Law defines "employee" as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship . . . ." § 440.02(15)(a), Fla. Stat. Independent contractors are explicitly excluded from the definition of employee. § 440.02(15)(d)(1), Fla. Stat.

A worker is an independent contractor rather than an employee if he or she satisfies at least one of seven statutory factors. § 440.02(15)(d)(1)(b), Fla. Stat. One such factor is satisfied if the worker "performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work." § 440.02(15)(d)(1)(b)(I), Fla. Stat.

This is a codification of the long-standing principle of Florida law that "control has always been the critical factor in a determination of independent contractor status." *See Buncy v. Certified Grocers*, 592 So. 2d 336, 337 (Fla. 1st DCA 1992); *see also Lindsey v. Willis*, 101 So. 2d 422, 426-27 (Fla. 1958) (finding that "the test as to what constitutes independent service lies in the control exercised").

Critically, an independent contractor "is responsible to his employer only as to the results of his work; an employee receives direction as to the manner in which the work is performed." *Buncy*, 592 So. 2d at 337. There is no "hard and fast rule" governing this determination, and "each case must be considered on its own facts." *La Grande v. B & L Servs., Inc.*, 432 So. 2d 1364, 1366 (Fla. 1st DCA 1983) (*citing Magarian v. S. Fruit Distribs.*, 1 So. 2d 858, 861 (Fla. 1941)). Generally, however, the test for control hinges on "who has the right to direct what shall be done, and when, where, and how it shall be done." *Edwards*, 560 So. 2d at 370.

i. This Court has held that control is the determinative factor in determining independent contractor status.

This Court has held that one is an independent contractor where one has "complete control" over his or her own work hours, workdays, and the manner in which assigned work is performed. *See id.* at 371; *see also Eighty Four Lumber v. Bethel*, 544 So. 2d 1094, 1095 (Fla. 1st DCA 1989) (finding that the claimant was an independent contractor because he worked on his own schedule, was not supervised by his putative employer, did not receive instruction from his putative employer, and did not have taxes deducted from his paycheck).

Conversely, this Court has acknowledged that one is an employee where his or her employer exercises "rigid control over the manner in which [the worker] perform[s] the tasks assigned to him," and "completely direct[s]" the work activities. *See Buncy*, 592 So. 2d at 336; *see*

also Del Pilar v. DHL Glob. Customer Sols. (USA), Inc., 993 So. 2d 142, 147 (Fla. 1st DCA 2008) (listing elements of control that suggest an employer-employee relationship as including, among other things, the employer's requirement that the employee undergo training, that the employee submit to inspections at the employer's discretion, and that the employee only use equipment selected pursuant to the employer's specifications").

ii. The Circus was concerned only with Claimant's ultimate performance—not his work schedule, hours, or routine.

Here, the record lacks substantial, competent evidence that the Circus controlled the manner in which Claimant performed his work. Accordingly, the JCC erred in determining that Claimant was an employee.

The Circus, in a contract unique to Claimant, agreed to pay $10,000 per week for him to perform an indefinite amount of times for the Circus. R. at 3. The contract did not allow the Circus to dictate the manner in which Claimant was to perform gymnastics. R. at 3-4. The contract did not establish how or how often Claimant should practice. *Id*. The contract did not provide Claimant with a schedule or make him clock his hours. *Id*. Further, the contract was clear that it was the Chinese government—not the Circus—that was to provide Claimant's clothing and costumes and bear nearly all of his expenses. R. at 4.

Simply put, the Circus did not control *how* Claimant performed gymnastics, but rather only cared that he performed successfully—the critical factor in determining independent contractor status. *See Edwards,* 560 So. 2d at 379 (holding the claimant was an independent contractor because she had "complete control over the details of her work," and there "was never a requirement that the work be done in any particular manner"). This lack of control illustrates that, as in *Edwards*, in which the putative employer was concerned only with the claimant's final

procurement of real estate sales, here, the Circus was concerned only with Claimant ultimately being able to perform gymnastics. *See Edwards*, 560 So. 2d at 370.

Furthermore, the present case is akin to *Eighty Four Lumber v. Bethel*, 544 So. 2d at 1095. There, the putative employer did not exercise control over how the claimant installed garage doors, did not instruct him on how to install the doors, and did not make him clock his hours. *Id*. Analogously, here, the record fails to show that the Circus interfered with how Claimant performed gymnastics, instructed him on how to practice, or made him work at any particular times. In *Eighty Four Lumber*, the putative employer's lack of control over the claimant persuaded this Court that the claimant was an independent contractor. *Id*. at 1096. Here, the Circus similarly has not exercised control over Claimant.

iii. The Chinese government, not the Circus, was responsible for Claimant's restrictions.

Moreover, the fact that Claimant was restricted to the Circus's quarters does not transform Claimant into an employee. R. at 4. The independent contractor determination hardly turns on one fact; rather, it is a totality analysis. *La Grande*, 432 So. 2d 1366. Additionally, this Court made clear in *Edwards* that "expecting that a worker be present at a location during a particular time" is not enough to transform an independent contractor into an employee. *Edwards*, 560 So. 2d at 372. Further, it was the Chinese government—not the Circus—which provided three Chinese security force bodyguards to ensure that Claimant would not leave the Circus's quarters. R. at 4. For these reasons, the requirement that Claimant stay on the Circus's grounds does not trump the Circus's overall lack of control over Claimant.

In sum, not only does the record lack substantial competent evidence that the Circus exercised control over the manner in which Claimant performed his services, but in fact, the record

is clear that the Circus did *not* exercise such control. Accordingly, the JCC erred in determining that Claimant was an employee of the Circus.

Applicant Details

First Name	**Jacob**
Last Name	**Shapiro**
Citizenship Status	**U. S. Citizen**
Email Address	**jpshap@umich.edu**
Address	**Address** **Street** **5510 Chamberlin Ave** **City** **Chevy Chase** **State/Territory** **Maryland** **Zip** **20815** **Country** **United States**
Contact Phone Number	**202679727**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2020**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 5, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law Reform**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Deacon, Daniel
deacond@umich.edu
734-764-5571
Friedman, Richard
rdfrdman@umich.edu
734-647-1078
Salinas, Melissa
salinasm@umich.edu
734-763-4319

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jacob P. ("Jack") Shapiro

Current: 912 E Ann St, Ann Arbor, MI 48104
Permanent: 5510 Chamberlin Ave. Chevy Chase, MD 20815
202-674-9727 • jpshap@umich.edu

June 5, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a recent graduate of the University of Michigan Law School, having just finished my third year. I am writing to apply to be a clerk in your chambers for the 2024-25 term.

As a two semester participant in the Federal Appellate Litigation Clinic, I had the opportunity to argue *United States v. Marlon Grant* before a panel of the Sixth Circuit last term and am spending this term briefing another case. Through these twin experiences, I have practiced the skills of thinking like a judge, anticipating how a case could be challenged and tested, and rigorously analyzing all relevant factual circumstances and case law.

I have a variety of additional experiences both prior to and during law school that have allowed me to develop strong skills in researching and writing that I believe will allow me to contribute immediately to your chambers. While at the University of Chicago, I wrote a research thesis on the Aeneid which earned special recognition. In the summer following my first year of law school, I clerked for Administrative Law Judge Thomas Harward at the Equal Employment Opportunity Commission offices in Los Angeles where I prepared research and drafted an opinion for summary judgment. As an Executive Editor for the Michigan Journal of Law Reform, I have been tasked with ensuring every citation is in correct format and that all cited sources actually support the proposition. I have developed the ability to do so both quickly and accurately. Finally, I recently completed the summer program at Latham & Watkins in Washington, D.C., where I learned strong research skills and how to operate as a legal professional in a fast-paced environment. I will be employed at the firm for the year between my graduation and the beginning of the 2024 term.

These experiences have led me to pursue a career in litigation. A clerkship would be a foundational and invaluable experience in my career. I believe that my writing and researching skills would make me a strong clerk in your chambers.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

- Clinical Professor Melissa Salinas: salinasm@umich.edu, (734) 764-2724
- Professor Daniel Deacon: deacond@umich.edu, (734) 764-5571
- Professor Richard Friedman: rdfrdman@umich.edu, (734) 647-1078

I appreciate your time and thank you for your consideration.
Sincerely,

Jack Shapiro

Jacob P. ("Jack") Shapiro

Current: 912 E Ann St., Ann Arbor, MI 48104
Permanent: 5510 Chamberlin Ave., Chevy Chase, MD 20815
202-674-9727 • jpshap@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — May 2023
GPA: 3.74
Journals: Journal of Law Reform, *Executive Editor Vol. 56*
Honors: Certificate of Merit: Rules of Play, Fall 2021
Activities: Federalist Society, Membership Development Chair (2022-2023)
Research Assistant for Professor Daniel Deacon (Winter Term 2023)

UNIVERSITY OF CHICAGO — Chicago, IL
Bachelor of Arts in Classical Studies with Honors — June 2020
Activities: Classics Society, General Officer, 2018-2020
Stony Island House Council 2016-2019, Vice President, 2018-19 (member of senior leadership team running events and managing a budget for 80 residents of university housing)
Thesis: "Medea, Dido, and the Unknown: Virtue Ignorant of the Future," *Awarded Honors*

EXPERIENCE

LATHAM & WATKINS, LLP — Washington, D.C.
Associate — Beginning Fall 2023
Summer Associate — May 2022 – August 2022

- Wrote a memo summarizing the state of law for a white-collar client, anticipating potential government theories and potential rebuttals based on existing case law.
- Researched alternative theories of client's case in response to newly handed down precedent on the issue.

FEDERAL APPELLATE LITIGATION CLINIC — Ann Arbor, MI
Student Attorney — August 2022 – Current.

- Prepared for and argued *United States v. Marlon Grant* before the U.S. Court of Appeals for the Sixth Circuit.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — Los Angeles, CA
Judicial Clerk for Judge Thomas Harward — June 2021 – July 2021

- Researched Americans with Disabilities Act standards to compose a citation library for future decisions.
- Drafted summary judgment opinion in case of TSA agent alleging discrimination interpreting requirements of law applying to disabled federal workers.

WORKER'S RIGHTS CLINIC — Ann Arbor, MI
Student Attorney — January 2021 – February 2021

- Developed winning case for unemployed worker denied unemployment benefits.
- Cross-examined witnesses during a court hearing.

INSTITUTE FOR JUSTICE — Arlington, VA
Litigation Intern — June 2019 – August 2019

- Wrote memos on the state of the law relating to the overuse of property seizure and conversion, as well as other topics, in various states and municipalities.

ADDITIONAL

Interests: Chess (rated 1200 online but climbing), Middle Eastern cooking (unrated but typically popular), Washington sports team fan (unapologetic stat geek)

Control No: E196812701 Issue Date: 06/02/2023 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Shapiro,Jacob Prescott
Student#: 14159439

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	510	002	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	B+
LAW	520	004	Contracts	Nicolas Cornell	4.00	4.00	4.00	A-
LAW	530	001	Criminal Law	David Moran	4.00	4.00	4.00	A-
LAW	593	007	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	S
LAW	598	007	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	S
Term Total				**GPA: 3.566**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.566**		**12.00**	**15.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	508	001	Modern Amer Legal History	William Novak	3.00	3.00	3.00	A
LAW	540	001	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	A-
LAW	580	001	Torts	Roseanna Sommers	4.00	4.00	4.00	A
LAW	594	007	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	S
Term Total				**GPA: 3.890**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.721**		**23.00**	**28.00**	

Continued next page >

Control No: E196812701 Issue Date: 06/02/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Shapiro,Jacob Prescott
Student#: 14159439

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	A
LAW	657	001	Enterprise Organization	Nicholas Howson	4.00	4.00	4.00	B+
LAW	674	001	Rules of Play:Sports Legal Sys	Richard Friedman	2.00	2.00	2.00	A+
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00	4.00	4.00	A-
LAW	885	010	Mini-Seminar	Leah Litman	1.00		1.00	S
			Supreme Court Term OT 2021	Daniel Deacon				
Term Total				**GPA: 3.757**	**15.00**	**14.00**	**15.00**	
Cumulative Total				**GPA: 3.735**		**37.00**	**43.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00		3.00	P
LAW	669	001	Evidence	Sherman Clark	3.00	3.00	3.00	A
LAW	695	001	International Trade Law	Jennifer Haverkamp	3.00	3.00	3.00	A-
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	B+
LAW	886	010	Mini-Seminar II	Leah Litman	0.00		0.00	S
			Supreme Court Term OT 2021	Daniel Deacon				
Term Total				**GPA: 3.630**	**13.00**	**10.00**	**13.00**	
Cumulative Total				**GPA: 3.712**		**47.00**	**56.00**	

Continued next page >

Control No: E196812701 Issue Date: 06/02/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Shapiro,Jacob Prescott
Student#: 14159439

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	560	001	Property	Thomas Gallanis Jr	4.00	4.00	4.00	A
LAW	731	002	Legal Ethics and Professional Responsibility	Bob Hirshon	2.00	2.00	2.00	A-
LAW	755	001	Trusts and Estates I	Thomas Gallanis Jr	3.00	3.00	3.00	B+
LAW	972	001	Federal Appel Litig Clnc I	Melissa Salinas	5.00	5.00	5.00	A
Term Total				**GPA: 3.807**	**14.00**	**14.00**	**14.00**	
Cumulative Total				**GPA: 3.734**		**61.00**	**70.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	677	001	Federal Courts	Chris Walker	3.00	3.00	3.00	B+
LAW	694	001	International Litigation	Mathias Reimann	3.00	3.00	3.00	A-
LAW	861	001	Law and Economics Workshop	JJ Prescott	2.00	2.00	2.00	A
LAW	900	904	Research	Daniel Deacon	1.00	1.00	1.00	A
LAW	973	001	Federal Appel Litig Clnc II	Melissa Salinas	5.00	5.00	5.00	A
Term Total				**GPA: 3.785**	**14.00**	**14.00**	**14.00**	
Cumulative Total				**GPA: 3.744**		**75.00**	**84.00**	

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

Michigan Law
University of Michigan Law School
625 S. State Street
ANN ARBOR, MICHIGAN 48109-1215

Daniel Deacon
Lecturer

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Jack Shapiro for a clerkship in your chambers. I first got to know Jack as a student in my Legislation and Regulation class, where he was excellent in class and received an 'A' grade. Jack is also in a yearlong mini-seminar I co-teach on the U.S. Supreme Court's current term. (At Michigan, mini-seminars are ungraded, discussion-based classes that take place at professors' homes.) Jack is the best participant in the mini-seminar, and it's not particularly close. I recommend him without reservation.

Jack was enrolled in my Fall 2021 Legislation and Regulation class. He was an active class participant and performed very well on "cold calls." He clearly knew his stuff, and he consistently came to class prepared not only to restate information from the casebook but also to add his own unique insights, which were always of high quality. Although I was the teacher, I feel like I learned things from Jack, too.

I was therefore not surprised when Jack wrote one of the strongest exams in the class. Looking back at it now, what stands out about Jack's exam is its nuance. He explored little nooks and crannies in a way that very few other students do. His responses were appropriately measured (the students were put in the role of giving prelitigation advice to a client), and they demonstrated a deep understanding of the course material—all the way from the principles of statutory interpretation through the nitty-gritty of administrative law.

As I mentioned, Jack is also enrolled in a yearlong mini-seminar I teach along with my partner, Professor Leah Litman. The mini-seminar involves reading briefs in cases currently pending at the Supreme Court of the United States. For each case, one student is charged with writing a short memo on the issues, which then serves as the springboard for discussion. Jack has been a very strong member of the mini-seminar, and, indeed, he'd be my choice for "most valuable participant." As he was in Legislation and Regulation, Jack comes prepared and ready to bring things to the table. He's a really smart person.

Jack has taken a good mix of classes and many challenging ones. His GPA has continued to improve since the fall of his 1L year. From what I can tell, he has a deep and genuine intellectual interest in the law. I think he'd be a great person to have in chambers. He's clearly got a keen mind when it comes to legal reasoning, but he's also easy to talk to and friendly. He has a background in classics and, as I can attest, will tell you the correct way to pronounce various Latin maxims.

Again, I recommend Jack and think he will be great. Please do not hesitate to get in touch with me if I can be of further help. My e-mail address is deacond@umich.edu. Especially in the current times, my cellphone is probably the best way to call me. That number is (646) 943-3566. I appreciate you considering Jack's application.

Sincerely,

Daniel Deacon

UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

RICHARD D. FRIEDMAN
Alene and Allan F. Smith Professor of Law

TELEPHONE: (734) 647-1078
E-MAIL: rdfrdman@umich.edu

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand that Jacob (Jack) Shapiro is applying to you for a clerkship. I think very highly of him, and am delighted to recommend him.

Jack is the oldest of three siblings, all within three years, and the son of two lawyers. It must have been a very lively household, and from an early age many adults predicted Jack would go to law school. I'm not surprised; he so enjoys engaging with issues and in back-and-forth discussions. "Really fun" is a phrase that crops up again and again in his conversation when talking about intellectual pursuits. A wonderful experience in AP Latin in high school steered him to Classics, which became his major at the University of Chicago. He wrote an honors thesis on the treatment of Dido in the Aeneid, and this drew him into comparisons with other works. He speaks with enthusiasm, and in an illuminating way, about the process of writing the thesis and about what would have been lost had he worked in translation. He enjoys working with texts and paying great attention to detail. And then he spent the summer after his junior year doing what he describes as legal-adjacent work at the Institute of Justice. He enjoyed that as well, and he got a lens on what legal work involved. And so he went along with the inevitable, and came to law school.

Jack was a student in my Rules of Play course in the fall of his second year. That's an unusual title for a course, so I'll explain. The premise is that a game is a legal system (you don't know what it is until you know the rules), and so you can talk about problems in the rules of sports and games with as much intellectual gain as you can about any other legal system. But for a sports fan, it's more fun. Jack was the outstanding student in class. He was an active participant, probably the most active, in class; no matter how obscure the sport or difficult the question, I could count on him to give a well-considered, well-informed, good-natured, energetic, and often even passionate comment. He wrote an excellent paper, and his exam work was, by quite a large margin, the best in the class. His grades throughout his first four semesters have been very strong, but from what I've seen of him he is a better candidate than even those grades would suggest.

Jack is clearly going to be a litigator; it suits his intellectual style. He enjoyed a judicial internship his first law-school summer, even though it was remote, and he did litigation with Latham & Watkins in D.C. this past summer; he's accepted an offer to return. He writes with nuance and flair. He will come to a clerkship prepared to draft very able opinions.

Personally, I've found Jack fun to talk to, in large part because he is so enthusiastic, well informed, and energetic on so many subjects. At the same time, he is polite and professional. I would very much enjoy working with him. All in all, he'll be a terrific clerk.

If there is anything else I can tell you about Jack, please do not hesitate to write or call. Meanwhile, thanks for your kind consideration.

Sincerely,

Richard D. Friedman

MICHIGAN LAW
FEDERAL APPELLATE LITIGATION CLINIC
UNIVERSITY OF MICHIGAN

Melissa M. Salinas, Esq. • Director, Adjunct Assistant Clinical Professor

Dear Judge,

I have the honor of writing to recommend Jacob (Jack) Shapiro for a clerkship in your chambers. I came to know Jack through his work in the University of Michigan Law School's Federal Appellate Litigation Clinic, which he joined in September of 2022. I taught and directly supervised Jack for two semesters as he litigated cases on behalf of indigent criminal defendants and prisoners. Jack is a talented, thoughtful, and dedicated student who has excellent qualifications and skills for a judicial clerkship.

In the clinic, Jack worked on two criminal direct appeals. He was required to research and apply concepts relating to criminal and appellate procedure, federal sentencing law, and constitutional law. In September 2022, I assigned Jack to present the oral argument in a case in October, approximately one and a half months later. The appeal's primary issue was a nuanced Fourth Amendment search and seizure claim. Instead of having months to familiarize himself with the record and case law, Jack had to immerse himself quickly in the case and prepare for argument.

Jack was up to speed almost immediately. Very early on in the process and at argument, he demonstrated an excellent familiarity with the record and the case law. Throughout the process, Jack actively sought and implemented feedback. He always wanted to know how he could improve and how a new phrasing might work. He proactively tried to anticipate how feedback on one part of the argument would change another part. He was always ready to ask about comments he did not understand or share concerns without ever crossing the line into resisting constructive criticism. I believe this showed his work ethic, his ability to learn a complex case quickly and accurately, and his enthusiastic attitude toward improving his work—all skills that would be valuable in your chambers.

And when he argued, Jack showed poise under pressure. He faced serious, tough questions. Jack stood up to those questions admirably and answered calmly and with poise. He showed that he was able to provide good answers to serious questions of the law. Due in no small part to Jack's outstanding work, we won the appeal and our client's conviction was vacated. The opinion is available at *United States v. Grant*, No. 21-3686, 2023 WL 119399 (6th Cir. 2023).

In the winter semester, I assigned Jack to draft an opening brief in a second criminal appeal. That appeal involved significant motion practice and pleadings. The primary issues on appeal related to a statutory mandatory minimum sentence, the categorical approach, and the career offender guidelines. Through Jack's work on his two assigned cases, I was able to observe his ability to litigate complex legal matters, as well as his interaction with clients and teammates. His legal research and writing, interpersonal skills, and work ethic are outstanding.

Jack's contributions as a final reader of others' briefs have also shown his work ethic and intellectual ability, as well as his skills in persuasive writing. Apart from copyediting, Jack gave thoughtful comments on the substance of the brief. His comments showed he had remained attentive to all issues we had discussed in class and considered them as he reviewed the brief. Likewise, in class, Jack has always been a source of insightful commentary on others' cases, briefs, and arguments. He has shown he can quickly

2058 Jeffries Hall, 701 S. State Street Ann Arbor, Michigan 48109 USA
T: 734 764-2724 F: 734 764-8242
law-falclinic@umich.edu

assimilate information and understand the implications of new lines of thinking and new factual considerations.

In sum, I have no doubt Jack will be an excellent law clerk. I fully support his application and have no hesitations. Please contact me by email at salinasm@umich.edu or on my personal cellular phone at (586) 530-6744 if I can provide further information.

Sincerely,

Melissa Salinas

Jacob P. ("Jack") Shapiro

Current: 912 E Ann St, Ann Arbor, MI 48104
Permanent: 5510 Chamberlin Ave. Chevy Chase, MD 20815
202-674-9727 • jpshap@umich.edu

The following piece is a memo I wrote for Professor Daniel Deacon at the end of my third year summarizing my findings from research I had done for him. I have edited it for clarity. It has not been edited by anyone else.

Research Memo on Denials of Petitions for Rulemaking After *Massachusetts v. EPA*

Introduction

You asked me to research changing law on when agencies can deny a petition for rulemaking based on the decision to prioritize other rulemakings with their scarce resources.[1] In particular, you asked me:

1) to look at how courts have interpreted part VII of *Massachusetts v. Environmental Protection Agency*, mainly the D.C. Circuit, which held that EPA's decision to delay making a rule on carbon dioxide emissions based purely on having other priorities and preferring a more comprehensive approach was not sufficiently grounded in the statute. 549 U.S. 497 (2007).
2) Whether agency materials reflected continued use of this priorities-and-resources reasoning, and if so, if there was any evidence their approach to doing so had changed.

The D.C. Circuit has taken a narrow approach to understanding this ruling. Instead of broadly asserting that agencies have little power to choose their priorities based on available resources, the circuit has focused on the language in the opinion stating that the unreasonable refusal to come to a scientific conclusion is the problem.

As a general matter, agencies' response follows two trends. First, agencies have continued to ground decisions at least partially on their limited resources and need to prioritize. Second, agencies have moved away from barely doing so. Instead, they tend to intertwine it with other reasons, sometimes explaining why they have come to believe the rule would offer less benefit than the alternative rulemakings they could pursue instead. These tend to result in

[1] All agencies are first referred to by their full names, and thereafter by acronyms, except if a party in a not yet named case.

decisions that facially only delay the eventual rulemaking, as they do not involve determining that the petitioned-for rule would be non-beneficial. Other times, they project so little benefit (perhaps none) from the rule that they determine they should not waste resources on it–i.e., that the agency can presume almost any other use of its time would give better returns. These tend to result in facially final denials, as absent a change in the perceived benefit, there will never be a point where the agency does not have better rulemakings to prioritize.

These trends did not emerge immediately following the *Massachusetts v. EPA* decision. Instead, they developed over time, roughly consistently with the development of D.C. Circuit case law.

Agencies may depend even more on these sorts of strategies soon. The Supreme Court recently granted certiorari in a case where one of the questions presented is, explicitly, whether to overrule or significantly narrow *Chevron*. Amy Howe, *Supreme Court Will Consider Major Case on Power of Federal Regulatory Agencies*, SCOTUSBLOG, May 1, 2023, https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies/. If agencies find that one of the major sources of flexibility in their decision making is gone, then they may find themselves more reliant on other sources of flexibility, even if those sources only permit less regulation.

Analysis

I. *Massachusetts v. Environmental Protection Agency* and the D.C. Circuit's Application

Part VII of *Massachusetts v. EPA* addressed the agency's alternative argument that, even if it had the authority to address carbon emissions under its enabling statute, it would still not choose to invest scarce rulemaking resources in a field where the administration was already pursuing important policy by other means. The Supreme Court rejected this argument as "divorced from the statutory text." 549 U.S. at 532. As the Court held, "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the

deleterious pollutant from new motor vehicles … to the extent that this constrains agency discretion to pursue other priorities … this is the congressional design." *Id.* at 533.

Rather than fulfill this duty, the Court held, EPA had merely offered "a laundry list of reasons not to regulate." *Id.* That other executive branch programs already provided the needed relief, that this would impair the President's efforts to negotiate international treaties, and a desire to avoid an inefficient, piecemeal approach to a larger issue all "ha[d] nothing to do with whether greenhouse gas emissions contribute to climate change." *Id.*

But this expansive pronouncement is paired with other words that suggest a more cautious approach to judicially mandating regulation. The opinion notes that EPA "has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." *Id.* The opinion suggested that EPA could have avoided rulemaking if its reasons "amount[ed] to a reasoned justification for declining to form a scientific judgment." *Id.* at 533-34. And it explicitly refused to determine that EPA had to make such a finding of endangerment. *Id.* at 534.

Academic opinion largely perceived this opinion as a rejection of an implicit freedom of agencies to set their priorities based on the resources available. Lower court rulings have not borne out this expectation.

The D.C. Circuit has instead largely followed the suggestion of the second line of statements–perhaps legally mandated, as those probably constitute the holding of Part VII. The D.C. Circuit has required agencies to offer some reasonable ground why a particular rule would be a lower priority or cannot be pursued at this time. If the agency has those reasonable grounds, the decision to deprioritize will usually not be arbitrary and capricious. This trend is particularly well explained in three D.C. Circuit cases.

In the first of these, *Wildearth Guardians v. United States Environmental Protection Agency*, an activist group petitioned EPA "to add coal mines to the list of regulated statutory source categories under the Clean Air Act." 751 F.3d 649, 650 (D.C. Cir. 2014). The petition

sought, in general, for coal mines to be regulated due to their emission of methane and particulate matter, with standards to be established for all such coal mines as new or existing sources. *Id.* at 650-51. Most significantly, the activists argued to the D.C. Circuit that *Massachusetts v. EPA* controlled the outcome of the case. *Id.* at 654 ("[petitioner] thus contends that EPA's action cannot survive review pursuant to the principles enunciated in *Massachusetts v. EPA*").

EPA, in denying the petition, explicitly said the denial was "'not based on a determination as to whether emissions from coal mines cause … air pollution." *Id.* at 652. Instead, the agency cited "resource limitations and the necessity of completing court-ordered rulemaking actions," specifically significant reductions in its budget and the large number of additional rulemakings and challenges to rules it was facing. *Id.* at 652-53. Accordingly, the agency needed to prioritize. It would do so by "taking a common-sense, step-by-step approach intended to obtain the most significant greenhouse-gas-emissions reductions through using the most cost-effective measures first." *Id.* at 653. It concluded that it needed instead to "address other, higher-priority actions" and that while it had not ruled out pursuing such a rule eventually, "it [would] not do so now." *Id.*

The D.C. Circuit held that the agency had proven it had reasonable grounds for denying the petition and those reasons were supported by the record. *Id.* The court stressed that EPA retained "significant latitude as to the manner, *timing*, content, and coordination of its regulations." *Id.* at 654 (quoting *Massachusetts v. EPA*, 549 U.S. at 533). EPA's justification for its timing–that it was "focusing first on promulgating standards for transportation and energy systems … [that] are the largest sources, responsible for more than 60% of … emissions"–found approval with the court as "consistent with the statutory objective." *Wildearth Guardians*, 751 F.3d at 653, 655 (D.C. Cir. 2014). In finding that EPA had met its burden, the D.C. Circuit particularly stressed the Supreme Court's alternative standard for EPA of "*provid[ing] some reasonable explanation as to why it cannot or will not … determine whether they do*." *Id.* at 653.

Petitioners did not contest EPA's determination that the coal mines contributed less to climate change than the transportation and energy sectors. Nor could they have plausibly done so. In effect, they had to cede the basis for prioritization. The standard would be further clarified by cases where the petitioners contested the legitimacy of the basis for prioritization.

In *Multicultural Media, Telecom and Internet Council v. Federal Communications Commission*, petitioners sought new rulemaking to make the nationwide emergency alert system multilingual. 873 F.3d 932, 935 (D.C. Cir. 2017). In that system, alert originators create emergency alerts which are automatically transmitted by private broadcasters, subject to regulations of FCC. *Id.* FCC only has authority over the private broadcasters, and not over the alert originators. *Id.* The petitioners argued that FCC should, as the only reasonable option, require the broadcasters to translate the emergency alerts into other languages and pass them along after that translation. *Id.* at 936.

FCC determined that this request posed a huge variety of logistical and practical challenges, rooted in everything from the sheer number of broadcasters involved to the statutorily mandated fast response time. *See generally id.* at 935-39. FCC determined that the right response was, for now, to do nothing. Instead, it would "[seek] more comprehensive information" on the practical capabilities of the broadcasters and continue to consider the question. *Id.* at 935. Even though the court derisively observed that the agency appeared to be conducting its inquiries "on what one might call 'bureaucracy standard time,'" it found the approach did pass muster because any rulemaking would involve challenges that it could not adequately address without more investigation. *Id.*

This sort of agency determination is not quite a determination that resources are too scarce to prioritize the petitioned-for rulemaking. But it still triggers many of the same concerns as *Massachusetts v. EPA*. First, EPA did advance an argument that they were reasonably choosing to allow other parts of the administration to take the lead on addressing climate change. Here, the D.C. Circuit explicitly approved the potential decision by FCC to allow the

alert originators–themselves typically government organizations–to instead determine when and whether to offer non-English translations. *Multicultural Media*, 873 F.3d at 939. Second, the D.C. Circuit did not signal at all that it was open to the idea of forcing FCC to accelerate its work, despite a general exhortation to "move expeditiously." *Id.* at 940. To the extent that an agency can move more quickly if it dedicates more resources to an issue, the refusal to order the agency to do so permits them to set its priorities around what information it will seek first and, effectively, what rules it will make.

In *Flyers Rights Education Fund, Inc. v. Federal Aviation Administration*, petitioners requested rulemaking on the size and width of airline seats, citing a variety of safety concerns. 864 F.3d 738, 740 (D.C. Cir. 2017). The D.C. Circuit ultimately granted the petition in part. *Id.* at 741.

Petitioners identified three dangers associated with the significant decrease in airplane seat size: slower exits during emergencies, contributing to deep vein thrombosis, and "soreness, stiffness, [and] other joint and muscle problems." *Id.* at 742. FAA[2] responded that the latter two risks were, respectively, associated with any long period of sitting irrespective of seat size and not health or safety risks. *Id.* at 742-43. For the former, FAA responded that it needed to consider "the immediacy of the safety or security concerns … the priority of other issues the administration must deal with, and … the resources we have available." *Id.* at 742 (cleaned up). The agency determined that the petition did not raise "an *immediate* safety concern" because the agency already "require[d] full scale evacuation demonstrations" that proved passengers could exit fast enough. *Id.* (emphasis added).

The D.C. Circuit determined that only the emergency exit decision was arbitrary and capricious. *Id.* at 744. The agency did not actually provide any emergency exit demonstrations

[2] The relevant portion of FAA's statutory mandate commands FAA to create standards and regulations to ensure "the highest possible degree of safety in the public interest." *Id.* at 741. Like the statute at issue for *Massachusetts v. EPA*, this theoretically does not permit FAA to ignore a safety risk at all.

that showed these narrow seat configurations allowed sufficiently swift exit. *Id.* at 744-45. Accordingly, all the agency had provided were a variety of tests that tested different variables from those identified by the petitioners. None of these could be used to rationally infer that seat size was not an immediate safety concern. *Id.* Therefore, the agency had not provided reasonable grounds for refusing to begin rulemaking.

FAA perhaps earned this more searching review when it did not frame its decision as a temporary delay. But functionally, the determination seems to have been animated by similar concerns: the agency believed it had already mandated sufficient tests to demonstrate safety under current conditions, and it did not want to spend more of its limited resources to repeat the determination.

Taken together, these cases demonstrate the D.C. Circuit rule: an agency can set priorities, provided it can give an adequate explanation why it has prioritized the way it has. This rule puts great emphasis on the alternative command to provide "reasoned justification for declining to form a scientific judgment" in *Massachusetts v. EPA* as an interpretive guide.

II. Agency Responses

I then reviewed agency denials of petitions for rulemaking to attempt to determine if the D.C. Circuit rule was producing any substantial effect on how agencies behaved. I found that, when agencies did offer limited resources as an explanation for their decisions, they tended to use one of two lines of argument, each consistent with the D.C. Circuit's rule.

A. The Nuclear Regulatory Commission and the Evolution of the "Minimal Benefits" Approach

The Nuclear Regulatory Commission was one of the most frequent agencies to appear in my research. Much like EPA, NRC has a governing statute that mandates a very conservative approach to safety and requires regulation of all substantial safety risks. NRC did not immediately respond to the *Massachusetts v. EPA* decision, but over time, its arguments began to conform more and more to the emerging legal rule. In these denials, we can see the evolution

of an argument that relies on finding the proposed rule minimally beneficial[3] and concluding that the agency has–and will always have–more efficient ways to spend its resources.

In 2008, immediately after the decision, NRC considered a petition seeking stronger regulations on uranium as a heavy metal pollutant, rather than as a radiological risk. James Salsman; Denial of Petition for Rulemaking, 73 Fed. Reg. 43381, 43381 (July 25, 2008). Though the agency based its denial on the sufficiency of existing safety standards, the agency concluded that it had "decided not to expend limited resources initiating a rulemaking at this time." *Id.* at 43385.

Also in 2008, NRC considered a petition for changes in rules governing radiopharmaceuticals. Peter G. Crane; Denial of Petition for Rulemaking, 73 Fed. Reg. 29445, 29445 (May 21, 2008). Rejecting the proposal, NRC explained it "ha[d] limited resources … in any given budget cycle, only a limited number of rulemakings can be funded." *Id.* at 29448. Because NRC did not believe the rule would have a significant safety impact, it did not merit the use of those limited resources. *Id.* NRC did not claim it would or might address the issue in the future. This denial showed the beginnings of a prioritization-in-time justification but did not fully develop it.

These decisions were made very close to *Massachusetts v. EPA*. With a little more time, there began to be a greater impact.

In 2013, NRC considered a petition requesting that they begin to require a nuclear proliferation risk assessment from every new nuclear enrichment plant applicant. Nuclear Proliferation Assessment in Licensing Process for Enrichment or Reprocessing Facilities, 78 Fed. Reg. 33995, 33995 (June 6, 2013). Although acknowledging the agency had a duty to "protect public health and safety and to promote common defense and security," NRC asserted that because "other Federal agencies within the Executive branch … ha[d] primary

[3] But note, not completely non-beneficial. Because there is or may be some residual minimal benefit, the agency cannot simply deny the petition on those grounds.

responsibility, expertise and *dedicated resources* for" addressing proliferation as such it was, in effect, not their job. *Id.* at 33997-98 (emphasis added). Instead, NRC would remain focused on physical security to prevent theft, diversion, and other general risks. *Id.* at 33998. It asserted that this would still play a role in the broader U.S. nonproliferation strategy without inefficiently expanding the scope of the licensing regime. *Id.* Petitioners had not shown that role was deficient. *Id.* The agency was no longer invoking its general lack of resources as a residual reason not to regulate.

Besides differences in the governing statute, this could be potentially distinguished from *Massachusetts v. EPA* by characterizing it as something besides a refusal to regulate altogether. Instead, the agency decides that existing rules reflect the fullest extent of their special expertise, and therefore is providing reasoned justification for refusing to make a scientific judgment.

By 2017, NRC's reasons were more in line with the D.C. Circuit test. That year, NRC discontinued a rulemaking and denied the relevant petition when it became clear that the industry would not use the optional regime it would have created. Decoupling an Assumed Loss of Offsite Power from a Loss-of-Coolant Accident, 82 Fed. Reg. 28017 (June 20, 2017). To secure more benefits, the agency determined to "devote its resources to" conceptually similar rulemakings in other areas of nuclear power. *Id.* at 28019. The agency carefully noted that it did not believe there was any safety problem with the current regime, thus avoiding an accusation that it was regulating with an eye towards some other factor besides maximum safety. *Id.*

This development continued. NRC in 2020 discontinued a rulemaking and denied the associated petition to delete certain footnotes from its regulatory tables. Modifications to Pressure-Temperature Limits, 85 Fed. Reg. 852, 852 (Jan. 8, 2020). The rulemaking was terminated as part of a general attempt to reprioritize agency actions that had been ongoing since at least 2016. *Id.* NRC concluded that discontinuing the regulation "would have a minimal adverse impact on the NRC's mission" because research to that point "did not establish any

information that would serve as the technical basis" to justify the rule. *Id.* Although sparse in explanation, NRC did clearly tie its resource-based deprioritization to an independent determination that the rule was unlikely to be beneficial.

The next year, NRC denied a petition to create a system for decommissioned nuclear power plants to be reactivated. Criteria to Return Retired Nuclear Power Reactor to Operations, 86 Fed. Reg. 24362, 24362 (May 6, 2021). NRC solicited comments to determine if there was industry interest in pursuing reactivation. *Id.* at 24363. There was little to none. *Id.* NRC therefore denied the petition because "proceeding with a rulemaking to develop a new regulatory framework that may not be used is not a prudent use of resources." *Id.*

The resolution of these three petitions presents the decision to prioritize resources only in the context of a determination that the rulemaking had minimal benefits, either for market or technical reasons. This marks a substantial change from the 2008 petitions that did not specifically find how much benefit could be expected when determining that the rulemaking did not justify the expenditure of resources. By including a reasonable ground, NRC came closer to, if not within, the standard contemplated by the D.C. Circuit.

B. The Minimal Benefits Approach and Other Agencies

Whether they borrowed it from NRC or not, other agencies have adapted and adopted its minimal benefits argument for their own use.

The National Highway Traffic Safety Administration did so when it denied a petition requesting a new school bus warning lamp system for use during loading and unloading. Federal Motor Vehicle Safety Standard No. 108; Lamp, Reflective Devices, and Associated Equipment; Denial of Petition for Rulemaking, 83 Fed. Reg. 3667, 3667 (Jan. 26, 2018). NHTSA denied the petition, reasoning that "[b]ecause NHTSA has limited resources with which to accomplish the goals of the Safety Act, the agency must make choices about how to most effectively and efficiently allocate resources. Accordingly, we will not take action … if we do not believe doing so will further interests of vehicle safety." *Id.* at 3668. It is unclear why the agency

felt the need to invoke its limited resources here. It would seem that the agency should still not take an action that did not further vehicle safety even with infinite resources. Perhaps the agency believed that it had not conclusively proven the lack of benefit, and worried about being commanded to investigate further. NHTSA similarly used the limited resources for rulemaking as a residual reason in 2008. Federal Motor Vehicle Safety Standards; Denial of Petition for Rulemaking, 73 Fed. Reg. 31663, 31665 (June 3, 2008).

Agencies may also be more general in these sorts of justifications. Sometimes, they merely reference them generally and pair it with a statement the current system is working well enough to justify denial. *E.g.*, Conaway Hip-Hugger; Denial of Petition for Rulemaking, 73 Fed. Reg. 76326 (Dec. 16, 2008). In that petition, because the devices at issue did not need an individual safety standard to be used, and because NHTSA had little confidence the devices were a net safety benefit based on the petition, NHTSA saw no reason to pursue rulemaking. *Id.* at 76327-28. Though NHTSA did not explicitly say it was concerned about resources,[4] they animate the denial: since the determination is that the rulemaking is not *necessary*, not that it might not be *beneficial*, the denial only makes sense as a decision to pursue more necessary rulemaking instead.

This is not the only strategy agencies have developed to continue using priorities-and-resources-based reasoning.

C. The First-Things-First Alternative

The alternative approach is to frame the issue as a matter of prioritizing more important agency actions and returning to the petitioned-for rule at some later time. As we saw above, this approach was explicitly approved by the D.C. Circuit in litigation over EPA action. The approach relies on identifying another potential rulemaking or action the agency could pursue instead, coupled with some reasonable grounds for determining that the alternative would be more

[4] Note this was soon after the *Massachusetts v. EPA* decision, and the agency may have been concerned about the ability of priorities-and-resources-based reasoning to hold up to scrutiny.

beneficial. In essence, the agency tells the petitioners it will do "first things first," and the petitioned-for rule is not one of those first things.

EPA regularly uses the first-things-first argument. *E.g.*, Response to Petition to Classify Discarded Polyvinyl Chloride as RCRA Hazardous Waste, 88 Fed. Reg. 2089 (Jan. 12, 2023). After explaining why it did not believe the petition identified a significant hazard from certain solid wastes, EPA turned to resources as a residual reason: "[B]ased on the information presented in the Petition, the resources that the EPA would have to allocate to [the rulemaking] are unwarranted and would preclude the EPA from pursuing more pressing rulemakings." *Id.* at 2091. The rulemaking would require "extensive research to understand [its] scope and impact" and "delay rulemakings that address hazards specifically identified by the EPA … [as] meaningfully improv[ing] public health and the environment." *Id.* at 2091-92. Accordingly, EPA would pursue those first and not the petitioned-for rule.

NHTSA also uses the first-things-first framing. When a petitioner sought new rules for enhanced cybersecurity for commercial vehicles, NHTSA "den[ied] the petition based on a lack of information … and the allocation of agency resources." Federal Motor Vehicle Safety Standards; Denial of Petition for Rulemaking, 87 Fed. Reg. 12641, 12641-42 (Mar. 7, 2022). The petitioner "ma[de] no specific assertions concerning wireless or remote attacks, only that 'Further research is needed'" and "failed to provide any solutions to those concerns." *Id.* at 12642-43. NHTSA's governing statute requires such information in a petition, but the agency also justified denial as a way to prioritize rulemakings that were either mandated by Congress or which could resolve a demonstrated safety need with available technology. *Id.* at 12643.

NHTSA has used private uptake as a reason to deprioritize rulemaking on a particular subject. Federal Motor Vehicle Safety Standards; Automatic Emergency Breaking, 82 Fed. Reg. 8391 (Jan. 25, 2017). Petitioners sought a rulemaking to mandate various automatic breaking technologies (AEB) on all light vehicles. *Id.* at 8391. The agency agreed that widespread adoption of these technologies would probably increase safety substantially, but noted that a

rulemaking would take a long time and potentially stymie innovation in a young technology. *Id.* at 8393. However, "through proactive collaboration with industry and other stakeholders, much has been and can be accomplished." *Id.* at 8394. Guidance documents and other levers had successfully enabled increased use of the technology. *Id.* "Given the success of light vehicle AEB activities described above, … the agency should place priority at this time on conducting [other] rulemakings." *Id.* The agency identified about three other intertwined areas that would receive priority instead. *Id.* Other than the unusual justification for why the particular rule was low priority, this denial was a textbook example of the first-things-first approach.

Conclusion and Potential Further Research

Agencies continue to use their limited resources as a part of their reasoning, both internally and as part of their justifications for denial. However, they have had to couple it with explicit, fact-based reasons for their determination that resources would be better spent elsewhere. The D.C. Circuit is willing to review these reasons to determine whether they conform to the statute (such as by maximizing the overall safety benefits the statute commands the agency to pursue) and whether the determination of priorities is arbitrary and capricious.

There are a few areas where I think further research might be interesting. First, the governing statutes of different agencies vary in what factors they ask the agencies to consider and how much discretion they might be read to provide. Does that affect how they consider their resources? This might require a larger dataset that was more differentiated by the particular agency rejecting each petition. It would require a more detailed analysis of the governing statutes and more general case law on those statutes. Relatedly, has there been a response to this part of *Massachusetts v. EPA* in the legislative arena?

I think it could also be interesting to, again, expand the set and look at trying to determine if the agencies have been spending more resources on preparing these denials or if they have, on average, been spending longer to deny one when they cite their resources in denying a petition. If the agencies have needed to provide more full justifications, and those

justifications take time and effort, we might see that in the time spent denying them. It would also show a way that this line of cases has impacted agencies without causing changes in reasoning.

Applicant Details

First Name	**Tyler**
Middle Initial	**K**
Last Name	**Shappee**
Citizenship Status	**U. S. Citizen**
Email Address	**tyshappee@gmail.com**
Address	**Address** Street **2216 E Ruby Ln** City **Phoenix** State/Territory **Arizona** Zip **85024** Country **United States**
Contact Phone Number	**6027992668**

Applicant Education

BA/BS From	**Grand Canyon University**
Date of BA/BS	**May 2016**
JD/LLB From	**Arizona State University College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=80302&yr=2011**
Date of JD/LLB	**May 6, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Law Journal for Social Justice**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Weinstein-Tull, Justin
justinwt@asu.edu
480-965-3229
Botello, Ana
ana_botello@fd.org
Berch, Jessica
Jessica.Berch@asu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Tyler Shappee | 2741 S. Buchanan St. | Arlington, VA 22206 | (602) 799-2668 | tshappee@asu.edu

June 12, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez:

I am a second-year student at the Sandra Day O'Connor College of Law at Arizona State University. I wish to apply for a clerkship in your chambers for the 2024-2025 term because I want to work in public service, especially at the federal level, and I know an internship in your chambers would be an invaluable preparation for this type of career.

When I applied to law school, I knew I was interested in clerking at the federal level, but I solidified that interest after externing in Judge Rayes' chambers. The externship allowed me to work closely with the judge and the career law clerk and to experience the work of chambers firsthand. After spending a semester in chambers, I know how tightknit the working environment is. This is a rare environment and is exactly what I want to be a part of.

I believe that I am the right fit for your chambers because I have the skills and experiences necessary to meaningfully contribute from the start. In Judge Rayes' chambers I wrote bench memoranda for civil cases on topics including personal jurisdiction, choice of law, and arbitration. I had a semester to receive and implement federal district court specific constructive feedback that would allow me to produce high quality work more easily. In addition, I drafted multiple complex sentencing memorandums while at the Federal Public Defender's Office. By the time of the clerkship, I will have had experiences working in two federal executive departments. Lastly, in addition to my legal internships, I have five years of professional work experience leading students and managing employees that I believe have prepared me to be a mature and professional addition to chambers.

You will be receiving letters of reference on my behalf from Professors Justin Weinstein-Tull and Jessica Berch, as well as from Ana Botello, my supervising attorney at the Federal Public Defender's Office. I am available for an interview at your convenience. Thank you for your time and consideration.

Respectfully,

Tyler Shappee

Tyler Shappee

2741 S. Buchanan St. | Arlington, VA 22206 | (602) 799-2668 | tshappee@asu.edu

EDUCATION

Sandra Day O'Connor College of Law, Arizona State University
Juris Doctor candidate — May 2024
GPA: 3.90 Rank: Top 10% (20/283)

Honors: Distinguished Oral Advocate (Legal Advocacy)
Willard H. Pedrick Scholar

Activities: Articles Editor for the Law Journal For Social Justice
Teaching Assistant for Civil Procedure I (Prof. Berch)
Teaching Assistant for Constitutional Law (Prof. Weinstein-Tull)
International Rule of Law & Security Fellow

Fuller Theological Seminary, Phoenix, AZ
MA, Theology, (44 credits completed) — Aug. 2018 - Dec. 2020

Grand Canyon University, Phoenix, AZ
BA, Christian Studies — May 2016
GPA: 3.97, *summa cum laude*

EXPERIENCE

U.S. Department of Justice, Human Rights & Special Prosecutions, Washington, DC — Fall 2023
Intern

U.S. Department of State, Office of the Legal Adviser, Washington, DC — Summer 2023
Intern
Working for the Office of African and Near Eastern Affairs and the Office of Management.

U.S. District Court for the District of Arizona — Fall 2022
Judicial Extern to the Honorable Douglas L. Rayes
Conducted extensive legal research in order to write draft orders for a motion to compel arbitration and a combined motion to dismiss and for judicial notice.

Federal Public Defender's Office for the District of Arizona, Trial Unit — Summer 2022
Intern
Drafted multiple sentencing memorandums and a motion for early termination of supervised release with minimal edits. Participated in client interviews, federal hearings, trial preparation, and trial.

Brilliance LED, Phoenix, AZ — June 2017 - Aug. 2021
Operations Manager
Oversaw all facets of daily operations. Developed and implemented processes company-wide. Provided extensive communication with customers and vendors through email and phone.

Paradise Valley Unified School District, Pinnacle High School, Phoenix, AZ — Aug. 2016 - May 2017
Spanish Teacher
Instructed, assessed, and managed roster of 180 students for Spanish 1-2 and 3-4.

OTHER SKILLS/ACTIVITIES
Basic proficiency in Spanish, international traveler, dog lover, fan of Marvel comics & movies, history and world religions buff

Arizona State University

Unofficial Transcript

Name: **Tyler Kyle Shappee**
Student ID: **1205874159**

Print Date: 06/04/2023
External Degrees
Grand Canyon University
Bachelor of Science 04/01/2016

Beginning of Undergraduate Record

Print Date: 06/04/2023
External Degrees
Grand Canyon University
Bachelor of Science 04/01/2016

Beginning of Law Record

2021 Fall

Course	Description	Attempted	Earned	Grade	Points
LAW 515	**Contracts**	4.000	4.000	A	16.000
LAW 517	**Torts**	4.000	4.000	A	16.000
LAW 518	**Civil Procedure**	4.000	4.000	A	16.000
LAW 519	**Legal Method and Writing**	3.000	3.000	B+	9.999

			Attempted	Earned	Points
Term GPA:	3.87	Term Totals	15.000	15.000	57.999
Cum GPA:	3.87	Cum Totals	15.000	15.000	57.999

2022 Spring

Course	Description	Attempted	Earned	Grade	Points
LAW 516	**Criminal Law**	3.000	3.000	A-	11.001
LAW 522	**Constitutional Law**	3.000	3.000	A+	12.999
LAW 523	**Property**	4.000	4.000	A	16.000
LAW 524	**Legal Advocacy**	2.000	2.000	A	8.000
LAW 638	**Professional Responsibility**	3.000	3.000	A-	11.001

			Attempted	Earned	Points
Term GPA:	3.93	Term Totals	15.000	15.000	59.001
Cum GPA:	3.90	Cum Totals	30.000	30.000	117.000

2022 Fall

Course	Description	Attempted	Earned	Grade	Points
LAW 605	**Evidence**	3.000	3.000	A	12.000
LAW 615	**Public International Law**	3.000	3.000	B+	9.999
LAW 623	**Fourteenth Amendment**	3.000	3.000	A+	12.999
LAW 735	**Teaching Assistant**	2.000	2.000	P	0.000
LAW 785	**Externship**	3.000	3.000	P	0.000

			Attempted	Earned	Points
Term GPA:	3.89	Term Totals	14.000	14.000	34.998
Cum GPA:	3.90	Cum Totals	44.000	44.000	151.998

2023 Spring

Course	Description	Attempted	Earned	Grade	Points
LAW 604	**Criminal Procedure**	3.000	3.000	A	12.000
LAW 609	**Administrative Law**	3.000	3.000	A	12.000
LAW 691	**Seminar**	2.000	2.000	A-	7.334
Course Topic:	Congress and the Courts				
LAW 691	**Seminar**	2.000	2.000	P	0.000
Course Topic:	North American Trade Law				
LAW 735	**Teaching Assistant**	2.000	2.000	P	0.000
LAW 791	**Seminar**	3.000	3.000	B+	9.999
Course Topic:	Int'l Law of Armed Conflict				

			Attempted	Earned	Points
Term GPA:	3.76	Term Totals	15.000	15.000	41.333
Cum GPA:	3.87	Cum Totals	59.000	59.000	193.331

2023 Fall

Course	Description	Attempted	Earned	Grade	Points
LAW 601	**Antitrust Law**	3.000	0.000	NR	0.000
LAW 641	**Foreign Relations Law**	2.000	0.000	NR	0.000
LAW 691	**Seminar**	2.000	0.000	NR	0.000
Course Topic:	Comp Constitutions and Rights				
LAW 706	**Immigration Law**	3.000	0.000	NR	0.000
LAW 768	**Intl Business Transactions**	3.000	0.000	NR	0.000
LAW 791	**Seminar**	3.000	0.000	NR	0.000
Course Topic:	US and Int'l Election Law				

			Attempted	Earned	Points
Term GPA:	0.00	Term Totals	0.000	0.000	0.000
Cum GPA:	3.87	Cum Totals	59.000	59.000	193.331

END OF TRANSCRIPT

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Tyler Shappee, a rising 3L at the Sandra Day O'Connor College of Law, for a clerkship in your chambers. I do so with the greatest enthusiasm and without any reservation. Tyler is a brilliant and responsible student who is a pleasure to work with. He has been a very, very top student of mine (receiving two A+'s) through two challenging courses, and he has been a TA for me as well. He is in the top 10% of his class. He will be a stellar clerk, and any judge who hires him will be thrilled that they did.

By way of context, Tyler was a student in both my Constitutional Law and Fourteenth Amendment classes. Constitutional Law is a required 1L course that covers the fundamentals of constitutional interpretation as well as the principles, doctrines, and theories of federalism and the separation of powers. In studying federalism, we cover Congress's authority to enact legislation pursuant to its Commerce, Tax, and Spending powers, as well as restrictions on federal control of states. In studying the separation of powers, we cover the appointment and removal powers, the executive's power of the sword, among other things.

Fourteenth Amendment is an upper-level course where students learn the law of the Equal Protection and Due Process Clauses. We begin with the passage of the Amendment after the Civil War and proceed through the legal decisions and social movements that interpreted it and brought it to life. Students learn the law of race and sex discrimination, the law of privacy (including abortion and marriage equality), and the law governing the enforcement of the Amendment. The course navigates many difficult and sensitive issues, and the students learn to discuss them in informed and rational ways.

Tyler received one of the highest numerical scores in both his Constitutional Law and Fourteenth Amendment classes, receiving an A+ in both. I don't think I've ever had a student get multiple A+'s in my classes. In classes of 80 students, getting an A+ is an extraordinary achievement. It means turning in an exam that is clearly written, well-organized, and substantively perfect. In both classes, Tyler caught everything I threw at him on the final – including both doctrinal and more conceptual questions.
Tyler's class participation was also excellent. He was always prepared for class and elevated class discussion when he spoke. Because the topic was constitutional law, it inevitably covered difficult and sensitive issues. Tyler navigated those issues in kind, calm, and rational ways.

Tyler's level-headedness in class is consistent with my own interactions with him outside of class as well. I got to know Tyler as a TA for my Constitutional Law class. He is an extremely responsible student and human being. He is mature, even-tempered, and committed – no surprise, having received an "A" in almost every class he's taken.

I strongly recommend that you hire Tyler.
Please feel free to contact me anytime.
Sincerely,

Justin Weinstein-Tull
(Cell: 541-968-3153)

FEDERAL PUBLIC DEFENDER
District of Arizona
850 W. Adams, Suite 201
Phoenix, Arizona 85007

JON M. SANDS
Federal Public Defender

602-382-2700
(Fax) 602-382-2800
1-800-758-7053

June 8, 2023

Dear Judge :

I am providing this letter of recommendation on behalf of Tyler Shappee for a clerkship position in your chambers. I got to know Tyler well as his supervising attorney during his twelve-week internship with our office the summer of 2022. He is the kind of intern I hope for—easy to get along with and produced timely, high-quality work throughout his summer with us.

Tyler is an excellent writer. He approached each new assignment with a positive attitude and intellectual curiosity, and I can confidently say that he would be an asset to any chambers. Though he was presented with novel issues and difficult assignments, he would take the initiative to seek out references and provide in-depth analysis with minimal guidance. He was always eager to receive constructive criticism and returned his edits in a timely manner. Overall, Tyler always delivered impressive work-product. For example, he was tasked with writing a sentencing memorandum for a case where judges typically sentence defendants to lifetime supervised release. Tyler's research and comparison to similarly situated defendants in other districts resulted in a sentence that was below the sentencing guideline recommendation, a true win for our client.

Furthermore, Tyler is mature and a joy to be around, important qualities for the work setting of chambers. I had the opportunity to spend time with Tyler, along with his fellow interns, during walks to court, drives to prison visits, and office gatherings. Tyler can navigate discussing controversial legal topics as well as lighthearted small talk. During visits to our clients in prison, a difficult environment, he handled the new setting easily and was able to show our clients the empathy and attention they deserve.

Finally, Tyler is a true team player and worked well with his fellow interns and the other attorneys in the office. During his time, he successfully worked on both individual and collaborative projects. At the end of the summer the interns provided a presentation that the attorneys could attend for CLE credit. Tyler collaborated with his fellow interns to create and deliver a seamless presentation on recent Ninth Circuit opinions on warrants. Individually, he worked he was assigned a motion for termination of supervised release by another attorney. This motion required him interviewing the client on the telephone alone in order to obtain the appropriate information.

In short, Tyler brings not only a positive attitude each day, but also a quality of work that I believe would make him an exceptional clerk. I would be happy to answer any questions that you may have.

Sincerely,

Ana Botello, AFPD, Law Student Supervisor

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to recommend Tyler Shappee for a clerkship position in your chambers. I've come to know Tyler very well because he has taken three courses with me and served as my Teaching Assistant in Civil Procedure I. Tyler will make an excellent law clerk because he is intelligent, hard-working, and personable, as I hope to convince you below.

First, law clerks need to be smart, and Tyler is both smart and competent. He's in the top 10% of his class at the Sandra Day O'Connor College of Law at Arizona State University and has earned strong As from me in both Civil Procedure I and Evidence. (I have every reason to believe he will achieve another high score in the third class, Criminal Procedure, but as I write this it is only March.) I was so impressed with Tyler in Civil Procedure that I invited him to serve as my Teaching Assistant the following year. As a TA, he so impressed me again that—for the first time in 10 years of teaching—I asked if he (and his co-TA) would like to teach a portion of one of my classes on best practices for exam taking. (I am generally quite zealous about my class time and rarely invite guest speakers, so the fact that I offered him this opportunity really speaks volumes about the esteem in which I hold him.) His presentation was top-notch. He gave invaluable essay exam tips such as skipping down to the call of the question, reviewing the relevant law and rules, and then reading the hypothetical with that information in mind while marking the relevant facts. News of this presentation spread around the law school and, although this ultimately fell through because of timing and other administrative issues, another professor in the law school asked if Tyler would be willing to speak with her students as well.

Quite frankly, Tyler is the sort of student I love having in class because he is always on time, prepared, and engaged with the materials. I call on students randomly in all my classes using flashcards that I reshuffle after each class so that students can't guess when their names might rise to the top. Tyler has been in three of my classes: Civil Procedure I (fall 2021), Evidence (fall 2022), and Criminal Procedure (spring 2023). To alleviate some stress, I allow students to "pass" once each semester. Tyler has never used a pass in any class. To the contrary, he always provides thoughtful and rigorous answers. I don't recall many specifics about my classroom interactions with most students—I teach about 150-200 students each semester and call on 10-20 each class period—but I do remember calling on him in Evidence to walk through a hypothetical involving Rules 608 and 609 (involving impeaching a witness's character for truthfulness). The questions I posed were nuanced and intended to make the student struggle with difficult concepts, such as what sorts of acts involve truthfulness as opposed to simply wrongfulness and what sorts of convictions fit within Rule 609. Tyler's answers exceeded my expectations.

Second, Tyler is a diligent and hardworking student. This past year, for example, he worked as my TA, took a full course load, externed for the Honorable Judge Douglas L. Rayes (Arizona District Court), and served on the Law Journal for Social Justice. He did all of this while still engaging fully with all his classes and even attending extra events, such as the federal Evidence Advisory Committee's fall meeting hosted by ASU Law School. In sum, I have confidence that Tyler can handle being pulled in many different directions and having multiple, overlapping obligations.

Finally, you'll enjoy having Tyler in your chambers. I look for normalcy, calmness, and compassion in my TAs because they often serve as my first line of defense when first semester 1Ls start spinning out because of the stress. Tyler exemplifies all those traits—and that is one of the many reasons I selected him as a TA. He is easy to get along with, and I'm sure he will be an asset in the close confines of chambers.

I hope I have shown why Tyler will be a great clerk. He is smart, hardworking, and pleasant. If you would like to speak with me about Tyler's candidacy, please don't hesitate to call me on my cell phone (602-402-6474) or reach out to me by email (jessica.berch@asu.edu).

Sincerely,

Jessica Berch
Senior Lecturer
Sandra Day O'Connor College of Law
Arizona State University

Writing Sample

The following is a draft order on a motion to dismiss that I wrote while externing for Judge Rayes in the Fall of 2022. The sample reflects my own work, and the sample is being provided with permission from chambers. At chambers request, party names, case numbers, and other case-identifying information have been replaced with fictitious alternatives.

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

eConnect Incorporated and Jason Thompson, Plaintiffs, v. Christopher Thompson CPA Incorporated, Defendant.	No. CV-22-00ABC-PHX-DLR **ORDER**

Before the Court are Defendant Christopher Thompson CPA Incorporated's motion to dismiss for lack of personal jurisdiction and failure to state a claim, (Doc. 20), and accompanying motion for judicial notice, (Doc. 21.) The motions are fully briefed. (Docs. 26, 27, 30, 31.) For the following reasons, Defendant's motion to dismiss is denied and the motion for judicial notice is granted.[1]

I. Background

Plaintiff Jason Thompson ("Jason") is an Arizona resident and Plaintiff eConnect Incorporated ("eConnect") is an Arizona corporation. (Doc. 15 ¶¶ 1-2.) Jason is an officer, director, and shareholder of eConnect. (*Id.* ¶ 8.) Around 2008, eConnect developed and maintained proprietary software to help homeowners' associations collect delinquent dues and assessments. (*Id.* ¶ 13.) Later, Jason created iLogistics, LLC ("iLogistics") and is a

[1] Plaintiffs' request for oral argument is denied because the issues are adequately briefed and oral argument will not assist the Court in resolving the pending motion. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

member along with non-party Chester Moller. (*Id.* ¶¶ 9-10.) eConnect owned the software but licensed it to iLogistics. (*Id.* ¶¶ 14-15.)

Defendant is an Ohio corporation. (*Id.* ¶ 3.) From 2009 to 2017, Defendant provided tax services for iLogistics and Plaintiffs. (*Id.* ¶ 18.) Jason's now-deceased father, Christopher Thompson ("Christopher"), was Defendant's sole shareholder, director, and officer, and he performed the accounting services from Ohio free of charge. (*Id.* ¶¶ 21, 26.) Unknown to Plaintiffs, in 2012 Defendant began capitalizing the development costs for eConnect's software on iLogistic's tax returns, which made the software an asset of iLogistics. (*Id.* ¶¶ 36-37.)

In 2016, Moller sued Jason in Arizona state court and used the tax returns prepared by Defendant to prove that iLogistics, not eConnect, owned the software. (*Id.* ¶¶ 38-39.) During that lawsuit, Christopher was deposed and admitted to erroneously capitalizing the software to iLogistics. (*Id.* ¶¶ 41-43.) Plaintiffs then settled with Moller in January 2020 for more than $2,000,000. (*Id.* ¶ 52.) Now, Plaintiffs bring claims against Defendant, seeking to hold it vicariously liable for Christopher's breach of fiduciary duty (*Id.* ¶¶ 56-60) and accounting malpractice (*Id.* ¶¶ 61-68).

II. Judicial Notice

Defendant requests the Court to take judicial notice of four exhibits (Docs. 20-2, 20-3, 20-5, 20-6.) It asserts that the exhibits are filings from the prior underlying suit and a government issued death certificate. Plaintiffs only object to the judicial notice of Doc. 20-5 because they dispute the facts and conclusions contained within. The Court may take judicial notice of public records without converting a motion to dismiss into one for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). However, the Court may not take judicial notice of a fact that is subject to reasonable dispute. *Id.*; Fed. R. Evid. 201. Therefore the Court will take judicial notice of all four exhibits.

The one document that Plaintiffs contest consists of factual findings of the Receiver's Report. The Court will take judicial notice of the existence of the report because it is beyond reasonable dispute that the report was issued and contained these factual

findings. To the extent Plaintiffs reasonably dispute the truth or validity of the factual findings in the order, the Court judicially notices only the fact that the report was issued and contained certain findings and conclusions. The Court does not take as true the findings and conclusions contained therein.

III. Personal Jurisdiction

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(2), a party may move to dismiss claims against it for lack of personal jurisdiction. In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing jurisdiction is proper. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015). "Where, as here, a defendant's motion to dismiss is based on a written record and no evidentiary hearing is held, the plaintiff need only make a prima facie showing of jurisdictional facts." *Id.* (internal quotations and citation omitted). Although a plaintiff cannot "simply rest on the bare allegations of its complaint," *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977), uncontroverted allegations in the complaint must be taken as true and any conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

B. Analysis

"Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits." *Id.* Arizona's long-arm statute allows Arizona courts to exercise personal jurisdiction to the maximum extent permitted under the Due Process Clause of the United States Constitution. *See* Ariz. R. Civ. P. 4.2(a); *A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1358 (Ariz. 1995). Due process requires that the defendant "have certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945) (internal

quotations and citation omitted).

"Depending on the strength of those contacts, there are two forms that personal jurisdiction may take: general and specific." *Picot*, 780 F.3d at 1211. General personal jurisdiction over a nonresident defendant requires "continuous corporate operations within a state so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Int'l Shoe Co.*, 326 U.S. at 318. Conversely, specific personal jurisdiction exists when a lawsuit arises out of, or is related to, the defendant's contacts with the forum. *Helicopteros Nacionales de Colo., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). Plaintiffs argue only for specific personal jurisdiction.

To establish specific personal jurisdiction, a plaintiff must show: (1) the nonresident defendant purposefully directed[2] his activities at the forum, (2) the claim arises out of the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden on the first two prongs and a failure to satisfy either of these prongs means that personal jurisdiction is not established in the forum state. *Id.* But "[i]f the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable." *Id.* (internal quotations and citation omitted). Specific personal jurisdiction over Defendant is proper because Plaintiffs have satisfied the first two prongs and Defendant has not demonstrated that the Court's exercise of jurisdiction would be unreasonable.

1. Purposeful Direction

Purposeful direction requires the defendant to have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017). "[R]andom, fortuitous, or attenuated contacts are insufficient to create the requisite connection with the forum." *Id.* (internal quotations and citation omitted). But

[2] For claims sounding in tort, as Plaintiffs' do, courts apply the purposeful direction test. *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017).

actions may still be directed at the forum state even if they occurred elsewhere. *Id.*

Defendant purposely directed its activities at Arizona. First, Defendant committed an intentional act when it performed tax services for Plaintiffs, specifically filing their state tax returns. Multiple district courts have held that performing accounting services and filing tax returns satisfies the intentional act prong of the purposeful direction test. *See*, *e.g.*, *Forty Niner Truck Plaza, Inc. v. Shank*, No. CIV. S-11-0860-FCD/DAD, 2011 WL 2710400, at *5 (E.D. Cal. July 11, 2011); *Wang v. Kahn*, No. 20-CV-08033-LHK, 2022 WL 36105, at *17 (N.D. Cal. Jan. 4, 2022). Second, Defendant expressly aimed its intentional acts at Arizona by filing Plaintiffs' state taxes here. Lastly, Plaintiffs are Arizona residents, so Defendant should have known that the harm from its alleged negligence would be suffered primarily in Arizona.

2. Claims Arise Out of Forum-Related Activities

Plaintiffs' claims arise out of Defendant's contacts with Arizona. A claim arises out of a defendant's contacts with the forum when the claim would not have arisen "but for" the defendant's actions directed toward the forum state. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998). Here, Defendant's contacts with Arizona consist, in part, of tax services performed for Plaintiffs and iLogistics and the alleged negligence occurred while performing these tax services. But for Defendant filing taxes in Arizona on behalf of Plaintiffs and iLogistics, Plaintiffs would not have suffered the harm alleged.

3. Reasonableness of Exercising Jurisdiction

Because Defendant purposely directed its actions at this forum and Plaintiffs' claims arise out of those forum-related contacts, the Court may exercise specific personal jurisdiction unless Defendant demonstrates that it would be unreasonable to do so. In evaluating the reasonableness of exercising jurisdiction, the Court applies a seven-factor balancing test that weighs:

> (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the

> forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp., 905 F.3d 597, 607 (9th Cir. 2018).

On balance, these factors do not weigh against the exercise of personal jurisdiction. First, although Defendant is and always has been an Ohio corporation that mainly provides services in Ohio, Defendant purposefully interjected itself into Arizona's affairs by providing tax filing services in Arizona for Arizona residents. Second, though litigating this matter might be relatively more burdensome for Defendant than litigating in Ohio, "[u]nless such inconvenience is so great as to constitute a deprivation of due process, [this factor] will not overcome clear justifications for the exercise of jurisdiction." *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991) (internal quotations and citation omitted). Defendant has not shown that the inconvenience of litigating in Arizona rises to this level. Third, Defendant has not persuaded the Court that exercising personal jurisdiction will conflict to any significant extent with Ohio's sovereign interest (if any) in the matter. Fourth, Arizona has a strong interest in adjudicating this action because states have a "manifest interest in providing an effective means of reparation for its residents tortiously injured by others." *Lake v. Lake*, 817 F.2d 1416, 1423 (9th Cir. 1987). Fifth, Arizona is the best locale to ensure efficient judicial resolution of the controversy; both Plaintiffs, most witnesses, and records relating to the claims are located in Arizona. (Doc. 26 at 9.) Sixth, Plaintiffs have a strong interest in litigating in their home state of Arizona, which provides Plaintiffs an avenue to potentially recover for the claims raised. Finally, the seventh factor is relevant only following a showing that the forum state is an unreasonable forum, a showing Defendant has not made based on the first six factors. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1080 (9th Cir. 2011). Because Defendant has not made a compelling case that exercising jurisdiction would be unreasonable, the Court finds that it has specific personal jurisdiction over Defendant.

IV. Failure to State a Claim

A. Legal Standard

When analyzing a complaint for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid dismissal, the complaint must plead sufficient facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

B. Analysis

Defendant argues that Plaintiffs fail to state a claim for two reasons: (1) the claims are time-barred and (2) a principal cannot be held vicariously liable for the torts of its agent unless the agent is joined as a defendant, something Plaintiffs did not do.

1. Statute of Limitations

As a preliminary matter, however, the parties disagree over which state's law applies. Defendant argues that Ohio law applies, while Plaintiffs argue for Arizona law. Under Ohio law, these claims have a four-year statute of limitations, OHIO REV. CODE ANN. § 2305.09(D) (West 2014), and there is no application of the discovery rule, *Investors REIT One v. Jacobs*, 546 N.E.2d 206, 211 (Ohio 1989). Under Arizona law, there is a two-year statute of limitations, *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 7 P.3d 979, 981-82 (Ariz. Ct. App. 2000), and an application of the discovery rule, *Gust, Rosenfeld & Henderson v. Prudential Life Ins. Co. of Am.*, 898 P.2d 964, 966 (Ariz. 1995). This issue is important to resolve because the outcome is different under Ohio and Arizona law.

A federal court sitting in diversity applies the forum state's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Arizona uses the Restatement (Second) of Conflict of Laws (1988) to determine the controlling law for

statutes of limitations. *Jackson v. Chandler*, 61 P.3d 17, 19 (Ariz. 2003).

> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) The forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Restatement § 142 (1988); *Jackson*, 61 P.3d at 19. "The general rule is very clear: as a starting point, the forum's statute of limitations applies." *Id.* (internal quotations and citation omitted). The claims would be timed barred in Ohio but not in Arizona. Therefore, because Arizona is the forum and it would permit the claim, it will be permitted unless the Court determines Arizona has no substantial interest in the action. The injury occurred in Arizona and Arizona has a significant interest in deterring wrongful conduct. *Id.* at 21. Arizona has a substantial interest in permitting the present action in this forum especially because Plaintiffs are Arizona residents. Because Arizona is the forum and has a substantial interest, its law applies to determine if Plaintiffs' claims are time-barred.

Statutes of limitations "identify the outer limits of the period of time within which an action may be brought to seek redress or to otherwise enforce legal rights created by the legislature or at common law." *Porter v. Spader*, 239 P.3d 743, 746 (Ariz. Ct. App. 2010). They serve primarily "to protect defendants and courts from stale claims where plaintiffs have slept on their rights *Gust*, 898 P.2d at 964, and also protect defendants from insecurity, *Porter*, 239 P.3d at 746. But "[o]ne does not sleep on his or her rights with respect to an unknown cause of action." *Doe v. Roe*, 955 P.2d 951, 960 (Ariz. 1998). Accordingly, Arizona applies the "discovery rule" to determine a claim's accrual date. *Gust*, 898 P.2d at 966. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the

plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Id.*

In professional malpractice cases, a cause of action does not accrue until the plaintiff discovers the negligence and sustains ascertainable harm as a result of that negligence. *CDT, Inc.*, 7 P.3d at 982 (internal quotations and citation omitted). "[N]egligence that results in no immediate harm or damage delays accrual of the cause of action until such damage is sustained." *Id.* at 982 (internal quotations and citation omitted). The damage must be "more than merely the threat of future harm." *Id.* (internal quotations and citation omitted). "Harm is actual and appreciable when it becomes irremediable [or] irrevocable." *Com. Union Ins. Co. v. Lewis and Roca*, 902 P.2d 1354, 1358 (internal quotations and citation omitted).

Here, the statute of limitations is two years for these claims. *CDT, Inc.*, 7 P.3d at 981-82. Defendant argues that Plaintiffs' claims are time-barred because Plaintiffs knew or should have known of the alleged negligence more than two years before they filed their complaint in January 2022. Defendant believes that Plaintiffs should have known of the negligence in 2016 when the underlying suit with Moller commenced, or in 2017 when Christopher admitted to erroneously capitalizing the software to iLogistics during his deposition. Plaintiffs respond that, although they were aware of the negligence at those times, their claims did accrue until they settled the underlying suit in January 2020 because that is when they suffered appreciable harm.

The Court agrees with Plaintiffs. Although Plaintiffs knew or should have known of the negligence by 2017 at the latest, Plaintiffs had not suffered appreciable harm at that time. Before Plaintiffs settled the underlying suit, any potential harm caused by Defendant's alleged negligence was not irremediable or irrevocable. For example, the underlying suit could have been voluntarily dismissed or resolved in Plaintiffs' favor. The mere possibility of harm resulting from Defendant's alleged negligence was not enough to start the limitations clock.[3] Because Plaintiffs did not suffer appreciable, non-speculative

[3] Defendant counters that Plaintiffs suffered appreciable harm in 2016 when they hired an attorney to defend the underlying suit. But Arizona caselaw appears to reject this

harm until January 2020, their claims are timely.

2. Vicarious Liability

Defendant argues that in order to hold a principal vicariously liable for the acts of an agent, the agent must be joined as a party to the suit—something Plaintiffs did not do. Again, the parties disagree over which states' law applies. However, for this issue the choice of law is moot because the result is the same under both Ohio and Arizona law. In order to hold a principal vicariously liable for the torts of an agent, a plaintiff must prove that the agent was negligent, but it is not necessary to name the agent as a defendant. *Huffman v. American Family Mut. Ins. Co.*, 2011 WL 814957, at *2 (D. Ariz. 2011); *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939, 944 (Ohio 2009); *see also McClure v. Country Life Ins. Co.*, 326 F. Supp. 3d 934, 948 (D. Ariz. 2018) (noting that the entire case against the employer was premised on vicarious liability, even though the individual employees who engaged in the malfeasance were not named as defendants); Accordingly, although Plaintiffs will need to establish Christopher's negligence in order to prove their case against Defendant, their failure to join him (or, more accurately, his estate) as a defendant does not warrant dismissal under Arizona or Ohio law.[4]

IT IS ORDERED that Defendant's motion to dismiss (Doc. 20) is **DENIED** and that Defendant's motion for judicial notice (Doc. 20) is **GRANTED**.

---

view. *See Myers v. Wood*, 850 P.2d 672 (Ariz. Ct. App. 1992) (holding that deciding not to bring an earlier $1,000 claim for attorney fees did not bar a later $400,000 malpractice claim); *Enterprising Sol., Inc. v. Ellis*, No. 1 CA-CV 14-0355, 2015 WL 4748020 (Ariz. Ct. App. 2015 Aug. 11, 2015) (following the holding of *Myers* under comparable circumstances).

[4] Courts should resolve tort issues under the law of the state having the most significant relationship to both the occurrence and the parties with respect to any issue. Restatement § 145(1). Relevant considerations include "(1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, (4) the place where the relationship, if any, between the parties is centered." *Id.* § 145(2). Ultimately, "[t]hese contacts are to be evaluated according to their *relative importance* with respect to the particular issue." *Id.* (emphasis added).
In this case, the factors are evenly divided between Arizona and Ohio. Therefore, the Court is unable to determine which factors to weigh more importantly because there was not adequate attention on the "relative importance" of these factors by the parties. Fortunately, the choice of law issue for the statute of limitations and vicarious liability were resolved on different grounds. Therefore, nothing in this order resolves the choice of law issue in regard to the merits of this case.

Applicant Details

First Name	**Connor**
Middle Initial	**R**
Last Name	**Sheehy**
Citizenship Status	**U. S. Citizen**
Email Address	**sheehycr@gmail.com**
Address	**Address** Street **4101 Albemarle St, NW, Apt #529** City **Washington** State/Territory **District of Columbia** Zip **20016** Country **United States**
Contact Phone Number	**6318852892**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**May 2021**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 19, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**American University Business Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Washington College of Law Moot Court Honor Society**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wermiel, Stephen
swermiel@wcl.american.edu
(202) 274-4263
Shoemaker, Jonathan
jcs@leeshoemaker.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Connor Sheehy

(631) 885-2892
sheehycr@gmail.com

School Address
4101 Albemarle St NW,
Apt #529,
Washington, DC 20016

Home Address
24 Abbot Road,
Smithtown, NY 11787

12 June 2023

To Judge Sanchez and chambers,

I am delighted to be writing to you in regard to the 2024-2025 federal clerkship position with Judge Sanchez! With both the passion and skill necessary to succeed in this role, I am confident that I would make a strong asset to your chambers and to the Court as a whole.

As a clerk with Judge Sanchez, my work ethic and dedication to my best work product would be unmatched. In law school, I have consistently taken every opportunity to hone my legal skills, including through participation in moot court, law review, and a secondary publication. Furthermore, I will also acquire work experience as a student practitioner of the entrepreneurship clinic prior to the start of this clerkship. I have consistently chosen to push myself to participate in every opportunity possible, and I respectfully believe that my experience doing as much as law school has to offer puts my skills on par with many individuals with some work experience who apply to this position.

As a law clerk, research, writing, and analytical skills are essential, and I am confident that my history shows my great ability in these areas. In addition to simply placing on law review, I have been part of the editorial board, am serving as a note and comment editor, and have my comment selected for publication in an upcoming issue. Furthermore, my success in moot court, placing as a finalist and a quarterfinalist in competitions thus far, exhibits my talent with legal argument and analysis. I have also highlighted my success with balancing a myriad of important responsibilities, such as through directing our law school's national moot court competition, resulting in one of the most successful years it has had. I have no doubts that my abilities in these areas are on the level necessary to succeed in Judge Sanchez's chambers.

Additionally, I have several legal work experiences across multiple types of practice - in a law firm, in a judge's chambers, and with in-house counsel, which has given me a broad understanding of legal practice. These experiences have greatly developed my interpersonal and professional skills, as well as have helped to translate my legal skills from the academic sphere to work.

Most importantly, I have a great interest in clerking particularly in Philadelphia. I have had a long-standing desire to practice in Philadelphia after completing my education. I have visited the city many times with my father, both as a young child and as an adult, and have a great passion for the city. As a student of history, Philadelphia has always been an extremely fascinating city to me and I have always had a great interest in working there long-term.

I am well aware that this position is extremely competitive. However, my candidacy for this position is backed by diverse work experience, immense extracurricular commitment (including leadership positions), and a particular passion for this Court, which together I confidently believe exceeds other candidates and reflects long-term commitment to this Court, the city of Philadelphia, and Judge Sanchez. For these reasons, I believe I am an ideal candidate for this role, and I would be overjoyed to have the opportunity to demonstrate my skills to you as a law clerk, where I know I would provide outstanding work product and achieve great success.

Sincerely,

Connor Sheehy

Connor R. Sheehy

4101 Albemarle St, NW, Apt #529, Washington, DC 20016 | sheehycr@gmail.com | (631) 885-2892

Education

American University, Washington College of Law — Washington, DC
Full-Time JD Candidate (3.49 Overall GPA, 3.7 2L GPA) — Aug 2021 - Present

- **Moot Court:**
  - **Executive Board**: Co-Director of the 2022 Burton D. Wechsler National First Amendment Moot Court Competition;
  - **Quarterfinalist**: 2023 Frank A. Schreck National Gaming Law Moot Court Competition;
  - **Finalist**: 2022 Alvina Reckman-Myers Moot Court Competition;
  - **Awards**: Recipient of the 2022 Moot Court Commitment Award;
- **Publications:**
  - **American University Business Law Review**: Editorial Committee; Note and Comment Editor; Comment Selected for Upcoming Publication;
  - **American University Intellectual Property Brief:** Senior Staffer;
- **Clinic**
  - **Entrepreneurship Clinic:** Accepted as a student-practitioner to the upcoming Spring 2024 transactional law clinic;
- **Dean's Merit Scholarship**: Recipient of Annual Merit-Based Academic Scholarship ($40,000/yr).

James Madison University — Harrisonburg, VA
Bachelor of Arts, Political Science and History (Double Major) — Aug 2019 - May 2021

- **Achievements:** Bachelor's Degree Achieved in 2 Years; Dean's List; Graduation With Honors;
- **Activities:** Phi Alpha Delta (Pre-Law); Student Government At-Large Senator; Local Campaign Work.

Legal Work Experience

Henry Schein, Inc. — Melville, NY
Summer Legal Intern — May 2023 - Present

- Work to date has included extensive legal research of statutes and regulations, reviewing files for board hearings, attending and analyzing depositions, researching updated state guidelines and creating proposals for updates to existing corporate policies, and creating proposals to streamline purchase orders.

New York State Unified Court System — Long Island, NY
Summer Judicial Intern — June 2022 - August 2022

- Attended and observed trials, settlements, negotiations, pre-trial motions, in-chambers conferences, and post-trial debriefs, as well as engaged in mentorship opportunities with participating attorneys;
- Engaged in networking and mentorship opportunities with individuals chosen as speakers in the NYS UCS Speakers Program, as well as privately with Justices of the Supreme Court of New York.

Lee/Shoemaker PLLC — Washington, DC
Summer Legal Associate — June 2021 - Aug 2021

- *Primary Firm Practice Areas:* Construction and Contract Law for Design Professionals;
- Drafted motions, subpoenas, corporate documents, case briefs, discovery files, business entity conversion documents, business registrations, and certificates of amendment;
- Conducted and reported on extensive legal research; attended and scheduled depositions; created and organized an extensive database on expert witnesses.

SHEEHY CONNOR R 5246880 12/08

06/06/23 1 OF 1

FALL 2021

LAW-501	CIVIL PROCEDURE	04.00	B+	13.20
LAW-504	CONTRACTS	04.00	A-	14.80
LAW-516	LEGAL RESEARCH & WRITING I	02.00	B+	06.60
LAW-522	TORTS	04.00	B+	13.20

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 47.80QP 3.41GPA

SPRING 2022

LAW-503	CONSTITUTIONAL LAW	04.00	B	12.00
LAW-507	CRIMINAL LAW	03.00	A-	11.10
LAW-517	LEGAL RESEARCH & WRITING II	02.00	B+	06.60
LAW-518	PROPERTY	04.00	B-	10.80
LAW-670	INTELLECTUAL PROPERTY LAW	02.00	A	08.00

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 48.50QP 3.23GPA

FALL 2022

LAW-508	CRIMINAL PROCEDURE I	03.00	A	12.00
LAW-601	ADMINISTRATIVE LAW	03.00	B+	09.90
LAW-623	COPYRIGHT	03.00	A-	11.10
LAW-803FA	MOOT COURT EXECUTIVE BOARD	01.00	P	00.00
LAW-847	APPELLATE ADVOCACY	03.00	A-	11.10
LAW-917F	BUSINESS LAW REVIEW I	02.00	--	--.--

LAW SEM SUM: 15.00HRS ATT 13.00HRS ERND 44.10QP 3.67GPA

SPRING 2023

LAW-550	LEGAL ETHICS	02.00	A	08.00
LAW-628	CRIMINAL PROCEDURE II	03.00	A-	11.10
LAW-633	EVIDENCE	04.00	A-	14.80
LAW-674	LAW OF PROFESSIONAL SPORTS	02.00	B+	06.60
LAW-871SC	MOOT COURT COMPETITION	02.00	P	00.00
LAW-885	CONSTRUCTION LAW	02.00	A	08.00

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 48.50QP 3.73GPA

FALL 2023

LAW-611	BUSINESS ASSOCIATIONS	04.00	--	--.--
LAW-647	FEDERAL PERSONAL INCOME TAX	04.00	--	--.--
LAW-649	PRE-TRIAL LITIGATION	03.00	--	--.--
LAW-918F	BUSINESS LAW REVIEW II	02.00	--	--.--
LAW-929	ADVANCED LEGAL RESRCH & WRTNG	02.00	--	--.--

LAW CUM SUM: 59.00HRS ATT 57.00HRS ERND 188.90QP 3.49GPA

END OF TRANSCRIPT

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

This letter is to recommend Connor R. Sheehy for a judicial clerkship. Connor is an excellent rising third-year student at American University Washington College of Law.

I have not had Connor in class, but I had an experience with him that brought his great intellectual strengths into a clear light. I serve as faculty adviser to our 30-student Moot Court Honor Society. As a 2L, Connor was co-director of a major national First Amendment Moot Court competition that we run every fall, attracting some thirty teams from throughout the country.

For several years we have hired a First Amendment expert to serve as the problem drafter. In spring 2022, our problem drafter became ill and stopped working on a then half-completed problem. Connor stepped in and, although he had not yet studied First Amendment, undertook completion of the problem. He identified a number of difficulties with the original draft which pushed us to refine and revise the problem. He rewrote the draft District Court opinion and then a Circuit Court opinion. All of this was done under extreme deadline pressure and with the highest standards of professionalism, great insight and analytical skill, and the warmest possible demeanor.

Essentially, I pushed him to drop everything he was doing and get this done as quickly as possible. He delivered an impressive work product, never complained about feedback or requests for fine-tuning, and demonstrated his great intellectual strengths in researching and writing.

In addition to this impressive deadline performance, Connor did a masterful job of juggling all of the details that go into running a national moot court competition, from hotel and plane reservations to food ordering to classroom booking to judge recruiting. The competition was run very smoothly in November 2022, and Connor's organizational abilities and work ethic deserve much of the credit.

Connor has also accomplished a great deal in two years as a law student, interning with judges in the New York State court system, writing a law review comment that is scheduled for publication in the fall, and successfully competing in moot court competitions that he was not organizing. His abilities are strong, and his work ethic goes deep.

Please don't hesitate to let me know if I may answer questions or offer more information. My cellphone is 240-472-2444, and my email is swermiel@wcl.american.edu.

Sincerely,

Stephen Wermiel
Professor of Practice of Constitutional Law and
Interim Director, Program on Law & Government
American University Washington College of Law

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I have had the pleasure of recommending Connor Sheehy for your consideration as a law clerk. During the summer of 2021, Connor worked at our firm handling a variety of assignments involving litigation and transactional work. The quality of Connor's work product, paired with his passion for the law, should make him an excellent law clerk.

First, Connor was diligent and professional in executing all tasks given to him. When given an assignment, Connor would ask intelligent questions to make sure he understood the assignment provided and, upon completing an assignment, would solicit feedback on the quality of his work product. Connor's enthusiasm for learning, and interest in obtaining constructive feedback (which he then applied in future assignments), are qualities which any employer should be able to leverage.

Second, Connor was enthusiastic in his research. Whether conducting legal research or technical research tied to expert opinions in a case, Connor would "dig in." For example, when asked to research industry publications related to the spontaneous breakage of glass in the construction industry for use in cross-examining an opposing expert witness, Connor located several technical publications (which our own expert witnesses had not identified!) for use in cross-examining the opposing expert witness. While some people may have been intimidated by researching technical subject matter, Connor was undaunted – a quality I anticipate will serve him well in the future.

Finally, Connor was an excellent communicator during his summer with us. At our firm, Connor had the opportunity to work with a number of different lawyers. Connor was successful at managing all of the different assignments provided to him, and communicating proactively to meet the demanding expectations of the lawyers giving him assignments.

Based on my experience working with him, I strongly commend your consideration of Connor for a clerkship. If you have any questions about Connor's qualifications, please do not hesitate to give me a call.

Sincerely,

Jonathan C. Shoemaker

Jonathan Shoemaker - jcs@leeshoemaker.com

Writing Sample - Connor Sheehy

- Excerpt of full appellate brief in accordance with FRAP and Federal Circuit Rules.
- Brief for a hypothetical *en banc* rehearing on a damages issue of a real Federal Circuit case.
- Self-edited; general comments and oral feedback from Professor give on the first draft but entirely self-edited.

Tronzo; therefore, the reduction constituted a correction within the scope of remand rather than a remittitur, and Tronzo was therefore not entitled to a new trial. *Id.* at 1351-52.

Following this decision, this case is presently before the Federal Circuit following the grant of Biomet's Petition for Rehearing *En Banc*, through which the judgment in *Tronzo II* was vacated and this Court instructed the parties to file new briefs *only* on the issue of punitive damages.

SUMMARY OF THE ARGUMENT

Biomet did not waive their right to appeal the punitive damages award by only raising it implicitly on appeal. First, the issue of the ratio between punitive and compensatory damages was not ripe until after the district court's decision on remand, so Biomet was not required to raise or otherwise waive the challenge. Second, even if that were not the case, Biomet necessarily challenged the punitive damages award by challenging the compensatory damages award because, as a matter of law, punitive damages awards are constitutionally interrelated to compensatory damages awards. Lastly, Tronzo mischaracterizes Biomet's challenge of excessiveness in the district court, and the excessiveness challenged in the second appeal was a largely different challenge (on different grounds) than the one in the initial case. Therefore, the scope of the mandate on remand from

the first appeal could not have foreclosed the opportunity to challenge punitive damages on remand, nor could any "law of the case" have been decided on the constitutionality of the award that prohibited the district court's review on remand.

Furthermore, the district court correctly found that the punitive damages award was unconstitutional following the reduction of compensatory damages and correctly reduced the award to $52,000. The analysis of the first *BMW* guidepost indicates that Biomet's conduct only exhibited a garden-variety degree of reprehensibility and that any further reprehensibility alleged by Tronzo was rejected for lack of sufficient evidence in the prior proceedings. The analysis of the second *BMW* factor indicates that the ratio of the original punitive damages award to the adjusted compensatory damages award is far outside the ratio typical under Florida law, far above the ratio tentatively considered maximum under 11th Circuit precedent relied upon by the district court, and far beyond the ratio the Supreme Court found to be "breathtaking." Finally, the analysis of the third *BMW* factor indicates that Tronzo mischaracterizes the relation between *Bard* and this case and that the criminal or civil penalties in this case would be far less than Tronzo alleges would be possible. Because all of the *BMW* factors weigh in favor of Biomet, the punitive damages award was correctly determined to be unconstitutional.

For the foregoing reasons, Biomet requests that this Court, rehearing the case *en banc*, affirm the finding by the district court on remand that the original punitive damages award was unconstitutional and affirm the subsequent reduction of the punitive damages award to $52,000.

ARGUMENT

A. Biomet did not waive their right to appeal the punitive damages award because it was either not ripe or necessarily raised on initial appeal, nor was review of the award on remand foreclosed by the mandate rule or the law of the case doctrine.

Tronzo appeals the reduction of the punitive damages award by the district court, claiming that the district court erred in doing so because Biomet never challenged the award on appeal in *Tronzo I*. *Tronzo II* at 1348. Tronzo claims that, if this is true, the district court's ability to review the award would be foreclosed by the mandate rule and the constitutionality of the punitive damages award would become the law of the case. *Tronzo II*, 236 F.3d 1347. Biomet asserts in response that the original punitive damages award is not prohibited from review by the mandate rule nor did its constitutionality become the law of the case after the initial appeal. Furthermore, Biomet asserts that the challenge was not ripe on initial appeal and, even if it

was, it would have been necessarily raised by challenging the compensatory damages award. *Id.*

1. Biomet did not waive their right to challenge the punitive damages award because the argument was not ripe during the initial appeal.

While Tronzo claims that Biomet should have challenged the punitive damages on initial appeal, or risk waiving the right to challenge the award, Tronzo mistakes the reason for which Biomet currently requests rehearing *en banc*. The primary constitutional issue that Biomet discusses to support the adjustment of the punitive damages award by the district court is the disproportionate ratio between the compensatory and punitive damages awards, which was not present until after the district court's decision on remand. *Id.* at 1348. As such, the issue would not have been ripe or even present to raise until *after* the judgment on remand.

Biomet could not have logically or legally waived an argument that it could not yet make. Parties are not generally required to raise arguments or issues on appeal when these arguments or issues are moot until after remand. *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954-55. The issue of the constitutionality of the award on the grounds of the disproportionate ratio was not and could not be necessarily decided by the district court prior to the first appeal because

the issue was not implicated at all at this point; therefore, Biomet did not waive their right to challenge the award on these grounds in this second appeal. *See Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 138 F.3d 1475, 1478-79 (Fed. Cir. 1998).

Tronzo incorrectly relies on two cases to allege Biomet should have raised the argument on initial appeal, but both of these cases involve arguments that were ripe on initial appeal and nothing said by the respective courts suggest that parties are required to raise issues that have not yet risen. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *see also Engel Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999).

While *some* challenges to the award may have been ripe and therefore needed to be raised in the initial appeal, the constitutionality of the disparity between the punitive damages and compensatory damages awards was not, and therefore it was not waived.

2. Even if the challenge was ripe, Biomet did not waive their right to challenge the punitive damages award because they necessarily challenged the award in the first appeal.

Even if this Court finds that the argument was ripe on the first appeal, Biomet then would have implicitly challenged the punitive damages award by challenging the compensatory damages

award, because a reduction or elimination of the compensatory damages award would have necessarily affected the analysis of the punitive damages award. This constitutionally interrelated adjustment would happen as a matter of law, so a court would abuse its discretion by creating an unconstitutional award ratio through its adjustments regardless of the explicit arguments of a party.

Additionally, if Biomet had prevailed in the initial appeal on its challenge to liability on the state law claims, the punitive damages award would have been eliminated as a matter of law. This is additional evidence that, regardless of the presence or lack of any explicit attempt to challenge the punitive damages award by Biomet on the grounds of the ratio being unconstitutional, the challenge to compensatory damages necessarily affects and challenges the punitive damages award's proportionality. Just as a reversal on liability eliminates damages as a matter of law, the proportionality of the compensatory and punitive damages award is a *constitutional*, not procedural, requirement through Supreme Court precedent in *BMW*. Therefore, it was implicated as a matter of law when the compensatory damages were challenged.

3. The mandate rule did not prohibit the district court from addressing the award of punitive damages on remand, nor was any law of the case created on the constitutionality of the punitive damages award that prevented review.

Tronzo also asserts that the district court previously considered, and rejected, Biomet's challenge to the excessiveness of punitive damages. *Tronzo II* at 1349. Tronzo concludes, as a result, that Biomet's failure to challenge this decision indicates that the mandate by this Court for remand foreclosed any opportunity to challenge the excessiveness of punitive damages. *Id.* Tronzo's argument regarding the mandate rule and Biomet's arguments in the district court are incorrect.

Firstly, the challenge and consideration of punitive damages in the district court was purely based on excessiveness of the award alone, made as a Rule 59 motion for a new trial. Biomet Br. At 30-32. The challenge in this appeal, following remand, is not a Rule 59 challenge for excessiveness, but rather, a challenge to the facial constitutionality of the award following the district court's judgment on remand. *Id.* These are legally distinct challenges, one procedural under the district court's discretion and one constitutional without implicating the district court's discretion, so Tronzo's argument that the challenge was already raised and rejected is facially incorrect.

See Hetzel v. Prince William County, 523 U.S. 208 (1998) (finding that the right to a new trial [as requested in the district court in this case through Rule 59] was distinct from a facial challenge of damages).

Since the challenges were distinct, this current challenge regarding the facial constitutionality of the award based on the proportionality of the ratio was not (and again, could not) have been substantially raised in the district court; therefore, it is not foreclosed by the mandate rule. *See Laitram*, 115 F.3d at 954-55; *see also Exxon*, 137 F.3d at 1478-79. The constitutionality of the ratio is neither "briefed nor argued" simply by raising the excessiveness of the punitive damages award in general in the trial court. *See Gregg v. U.S. Industries*, 715 F.3d 1522, 1534 (11th Cir. 1983).

Furthermore, no law of the case could have resulted on the facial constitutionality of the damages ratio prior to the remand. Tronzo undervalues the legal significance of the ratio between the two awards. The ratio is explicitly stated to be one of the *BMW* factors in judging the constitutionality of the awards by the Supreme Court. As a distinct challenge from the one made prior to remand, and one that was not implicated until judgment on remand, the district court and this court could not have substantively discussed or decided on this issue; therefore, no law of the case could have resulted. *See Smith*

International, Inc. v. Hughes Tool Co., 718 F.2d 1573 (Fed. Cir. 1983). Furthermore, the law of the case doctrine is a policy tool for "sound judicial administration" and should be disregarded when preservation of a prior determination would be manifestly unjust, so Tronzo's rigid understanding of this doctrine is misplaced. *Id.*

Furthermore, the Federal Circuit in *Tronzo I* left the district court to adjust "damages" on remand; without specification, it should be assumed that this term includes both compensatory and punitive damages because the Federal Circuit could have specified only compensatory damages were to be adjusted on remand if this was the court's intent.

Because the argument was not ripe during the initial appeal, or alternatively was necessarily raised on initial appeal, and because the mandate rule and law of the case doctrine do not foreclose a new argument on different grounds after remand in this case, Biomet did not waive their right to challenge the punitive damages on these grounds. Therefore, the district court did have authority to, and correctly did, reconsider the punitive damages award.

B. The district court correctly reduced the punitive damages award to $52,000 in light of the reduction of the compensatory damages award to $520 and the resulting constitutional considerations.

Based on the conclusion aforementioned that review of the punitive damages award was proper on remand, the analysis under the *BMW* guideposts outlined by the Supreme Court indicates that the award was unconstitutional and that the district court properly reduced the award. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

1. The Reprehensibility of the Conduct (BMW's First Guidepost)

While the district court did conclude that the claims for misappropriation and misstatements to the FDA were sufficiently evidenced, insufficient evidence was present to substantiate Tronzo's additional claims, including allegations of a scheme to defraud the FDA, that Biomet had harmed patients, and that the Mallory/Head profits were derivative of Tronzo's design. *Tronzo* II, at 1345. There was no evidence provided to substantiate any scheme or harm to patients, and the district court found that there was an insufficient evidence to substantiate a nexus between the injury and the Mallory/Head profits to substantiate liability. *Id.*

Biomet caused only economic harm, not physical, did not exhibit indifference or reckless disregard to health and safety, did not target individuals with financial invulnerability, and did not repeatedly engage in misappropriation. *See* generally *Tronzo I.* Furthermore, the evidence in the record is insufficient to substantiate a scheme of deceit and trickery, even if a few misstatements were made. Therefore, the reprehensibility was garden-variety at most and no punitive damages ratio beyond a typical ratio can be supported. *See State Farm Mutual Auto Ins. V. Campbell*, 538 U.S. 408 (2003) (finding that these factors weighed in favor of finding a lower degree of reprehensibility and therefore did not warrant a higher-than-normal ratio of punitive damages to compensatory damages).

As such, the first *BMW* factor weighs in favor of unconstitutionality.

2. The Ratio Between Compensatory and Punitive Damages Awards (*BMW*'s Second Guidepost)

Tronzo incorrectly points to the largeness of the punitive damages award as justified in equity by the smaller compensatory award (and misunderstands *BMW* in doing so). *See* Tronzo Br. at 40, note 4. *The* Court in *BMW* found that punitive damages were not meant to "fill-in" for unsubstantiated compensatory damages, but rather, to bear a relationship to the compensatory damages that were properly substantiated. *BMW*, 517 U.S. at 580. Excess

punitive damages are not warranted beyond a reasonable ratio, without an extreme degree of reprehensibility, simply because Tronzo will not recover in amounts reflective of his injury when he failed to substantiate a larger amount of compensatory damages.

Furthermore, the Court in *BMW* found that, while no specific ratio drew the line between constitutional and unconstitutional, a ratio of 500 to 1 was "breathtaking." *Id.* at 583. If the original punitive damages award were to be reinstated, the ratio would stand at 38,000 to 1, which far exceeds the ratio that even the Supreme Court questioned the constitutionality of. Furthermore, Tronzo has failed to establish legally sufficient evidence beyond misappropriation and a few misstatements to the FDA, which does not substantiate the possibility of exceptional reprehensibility that would warrant a higher-than-normal ratio.

As such, the second *BMW* factor weighs in favor of unconstitutionality.

3. The Comparison with Possible Civil and Criminal Penalties (*BMW*'s Third Guidepost)

Tronzo asserts that Biomet's officers and employees would face severe civil and criminal penalties, possibly including imprisonment, by analogizing the present case to *United States v. C.R. Bard, Inc.* 848 F. Supp. 287 (D. Mass. 1994). However, Tronzo fails to recognize that, unlike the court in *Bard*, the

district court rejected the assertion that Biomet caused a risk to the health or safety of the patients and found the conduct in Bard to be substantially more reprehensible. *See Tronzo I*.

Furthermore, there is no evidence that the FDA took action or is considering taking action against Biomet regarding this conduct, whereas *Bard* involved a guilty plea to almost 400 felonies. Bard, 848 F. Supp. at 288. Therefore, the penalties are likely to be nonexistent in this case, but even if the FDA pursued them they would be far less than *Bard*.

As such, the third *BMW* factor also weighs in favor of unconstitutionality.

4. The *BMW* factors weigh in favor of finding the punitive damages award to be unconstitutional, and the district court correctly reduced the award to $52,000.

The district court found that, because the compensatory damages do not adequately reflect the harm, the ratio of punitive to compensatory damages should be greater than the typical 3 to 1 ratio in the state of Florida.

Following precedent from *Johansen v. Combustion Engineering, Inc.*, the district court used the maximum damages ratio appropriate of 100 to 1, in policy consideration of deterring similar conduct (though, Biomet maintains that the conduct in *Johansen* was more reprehensible, where natural

resources were ruined and wildlife was killed). 170 F.3d 1320, 1339 (11th Cir. 1999).

Despite there being no absolute ratio limit set by *BMW*, *Johansen* is representative of precedent indicating that 100 to 1 is a ratio that rubs the border of constitutionality. Furthermore, even if this were not the case, the analysis above indicates that the *BMW* factors weigh in favor of finding the ratio unconstitutional as a general matter because it misrepresents the reprehensibility and scope of criminal or civil penalties associated with the conduct.

Because the *BMW* factors weight against the $20,000,000 punitive damages award, and because the ratio itself is contrary to precedent setting tentative maximum limits on the ratio between punitive and compensatory damages, this Court should affirm, *en banc*, the reduction of the punitive damages award to $52,000 by the district court.

CONCLUSION

For the foregoing reasons, Biomet requests that this Court, rehearing the case *en banc*, affirm the finding by the district court on remand that the original punitive damages award was unconstitutional after compensatory damages were reduced, as well as affirm the subsequent reduction of the punitive damages award to $52,000.

Applicant Details

First Name	**Elizabeth (Betsy)**
Last Name	**Sheppard**
Citizenship Status	**U. S. Citizen**
Email Address	**eshep@umich.edu**
Address	**Address** Street **3009 Park Ave** City **Lafayette Hill** State/Territory **Pennsylvania** Zip **19444** Country **United States**
Contact Phone Number	**4842136701**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2020**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 5, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Michigan Journal of Law Reform**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Michigan Law Oral Advocacy Competition** **Henry M. Campbell Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Becker, Ted
tbecker@umich.edu
734-763-6025

Mortenson, Julian
jdmorten@umich.edu
734-763-5695

Edmonds, Mira
edmondm@umich.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 04, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third year law student at the University of Michigan originally from Lafayette, Hill Pennsylvania, and I am writing to apply for a clerkship position in your chambers for the 2024 term.

This summer, I will be working for a Philadelphia-based law firm, and plan to return to the Philadelphia area after graduation from law school, as my family still resides in the area. I am particularly excited about the opportunity to clerk for a judge in my own community and serve as a member of my community's legal process.

I am passionate about building a career in litigation, a passion which grew throughout my experience in law school. As a history major, I have always enjoyed research and writing, but during my first-year legal practice course, I gained exposure to new types of research and writing that further developed this interest. I especially enjoyed presenting my research through written briefs and oral advocacy simulations. This led me to participate in the Michigan First-Year Oral Advocacy Competition and to compete in Michigan's flagship moot court competition, in which I advanced to the quarterfinal round. In addition to these mock appellate experiences, I joined the Michigan Law mock trial team to gain exposure to the trial process.

My interest in litigation, however, extends beyond oral advocacy. In addition to my oral advocacy experience, I have completed substantive research and writing, such as for a student note. Through my work with the Michigan Journal of Law Reform, where I now serve as the managing production editor, I produced a note exploring qualified immunity for educators in the context of § 1983 suits. I have also completed research and writing through my practical lawyering experiences.
During my first-year summer, I worked for a small policy organization focused on reforming the criminal justice system. In this role, I conducted substantial case law research on issues affecting criminal law and criminal-adjacent topics, and I also analyzed pending Congressional legislation to determine its potential applicability to criminal justice reform efforts. Next, during my second year of law school, I directly represented clients through my university's Civil-Criminal Litigation Clinic, including in landlord-tenant, commutation, and private tort cases. This real-life litigation experience increased my interest in the judicial process generally and confirmed my passion for litigation.

I have attached the requested materials for your consideration. Letters of recommendation from the following individuals will follow under separate cover:

• Professor Ted Becker: tbecker@umich.edu, (734)-763-6025

• Professor Mira Edmonds: medmond@umich.edu, (734)-647-1964

• Professor Julian Mortenson: jdmorten@umich.edu, (734)-763-5695

Thank you for your time and consideration.

Sincerely,

Elizabeth Sheppard

Elizabeth (Betsy) Sheppard

3009 Park Avenue, Lafayette Hill, PA 19444
(484)-213-6701 • eshep@umich.edu
She/Her/Hers

EDUCATION

THE UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Expected May 2024

Journals: *University of Michigan Journal of Law Reform*, Managing Production Editor Vol. 57
Honors: Quarterfinalist, Henry M. Campbell Moot Court Competition, 2022-2023
Honors in Legal Practice
Activities: Women Law Student Association, Programming Chair
Mock Trial Team
Civil Rights Litigation Clearinghouse, Contributor, Fall 2020 – Winter 2023
Oral Advocacy Competition, 2022

THE GEORGE WASHINGTON UNIVERSITY — Washington, DC
Bachelor of Arts in history with a minor in French, *magna cum laude* — May 2020
Honors: Gardner G. Hubbard Memorial Prize for Excellence in U.S. History, Special Honors in History
Activities: Undergraduate Law Review, 2019-2020
Phi Alpha Theta, History Honors Society
Phi Alpha Delta, Pre-Law Fraternity

EXPERIENCE

DUANE MORRIS — Philadelphia, PA
Summer Associate — Summer 2023

CLAUSE 40 FOUNDATION — Washington, DC
Legal Intern — May 2022 – August 2022

- Conducted non-profit law and procedural due process research for a 501(c)(3) committed to ensuring due process rights for all.
- Compiled updates on Congressional legislation and sentencing data for lobbying efforts.

COLONIAL MIDDLE SCHOOL — Plymouth Meeting, PA
Long-term French Substitute — January 2021 – June 2021

- Organized and executed lesson plans for 11 French classes with 240 in-person, hybrid, and remote learners.
- Supported students through classwork, individual guidance, and softball coaching.

ABINGTON FRIENDS SCHOOL — Jenkintown, PA
Assistant Teacher — September 2020 – January 2021

- Served as in-person teacher for introductory and intermediate language classes alongside co-teachers instructing via Zoom.

THE CRAB HOUSE AT TWO MILE LANDING — Wildwood Crest, NJ
Food Runner — July 2020 – August 2020

- Engaged with restaurant clientele at a large, fast-paced restaurant, promoting enjoyable experiences.

YMCA CAMP TOCKWOGH — Worton, MD
Athletic Director — Summers 2018 & 2019

- Managed a team of 10 athletic staff members who led daily sports activities for over 400 campers per day.
- Developed curriculum and safety protocols for the athletics program, including the implementation of a target sports program.

ADDITIONAL

Languages: French (working proficiency), Spanish (elementary)
Interests: Watching French TV shows, making homemade pasta, and watching the Philadelphia Phillies

Control No: E196664701 Issue Date: 05/30/2023 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sheppard,Elizabeth A
Student#: 60014784

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021			**(August 30, 2021 To December 17, 2021)**					
LAW	510	004	Civil Procedure	Maureen Carroll	4.00	4.00	4.00	B+
LAW	520	003	Contracts	Albert Choi	4.00	4.00	4.00	A-
LAW	540	002	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	A-
LAW	593	016	Legal Practice Skills I	Ted Becker	2.00		2.00	H
LAW	598	016	Legal Pract:Writing & Analysis	Ted Becker	1.00		1.00	H
Term Total				**GPA: 3.566**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.566**		**12.00**	**15.00**	
Winter 2022			**(January 12, 2022 To May 05, 2022)**					
LAW	530	002	Criminal Law	Luis CdeBaca	4.00	4.00	4.00	A-
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	B
LAW	594	016	Legal Practice Skills II	Ted Becker	2.00		2.00	H
LAW	724	001	International Refugee Law	Betsy Fisher	3.00	3.00	3.00	A-
LAW	992	306	Research: Special Projects Civil Rights Litigation Clearinghouse	Margo Schlanger	2.00	2.00	2.00	A
Term Total				**GPA: 3.530**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.548**		**25.00**	**30.00**	

Continued next page >

Control No: E196664701 Issue Date: 05/30/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sheppard,Elizabeth A
Student#: 60014784

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	B+
LAW	771	001	Progres Prosecution: Law&Pol'y	Eli Savit	2.00	2.00	2.00	A
				Victoria Burton-Harris				
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	885	007	Mini-Seminar	Susan Page	1.00			Y
			The Enduring Allure of Book Bans					
LAW	920	001	Civil-Criminal Litigation Clnc	Mira Edmonds	4.00	4.00	4.00	A-
				Victoria Clark				
LAW	921	001	Civil-Criminal Litig Clnc Sem	Mira Edmonds	3.00	3.00	3.00	A
				Victoria Clark				
Term Total				**GPA: 3.725**	**15.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.605**		**37.00**	**44.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	428	001	Evidence Practicum	Daniel Hurley	2.00	2.00	2.00	A
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	B+
LAW	674	001	Rules of Play:Sports Legal Sys	Richard Friedman	2.00	2.00	2.00	B+
LAW	677	001	Federal Courts	Chris Walker	3.00	3.00	3.00	A-
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	865	001	Law of American Federalism	Gil Seinfeld	2.00	2.00	2.00	A
LAW	886	007	Mini-Seminar II	Susan Page	0.00		0.00	S
			The Enduring Allure of Book Bans					
Term Total				**GPA: 3.607**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.606**		**50.00**	**59.00**	

Continued next page >

Control No: E196664701 Issue Date: 05/30/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sheppard,Elizabeth A
Student#: 60014784

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/30/2023							
LAW	641	001	Crim Just: Invest&Police Prac	Ekow Yankah	4.00			
LAW	681	001	First Amendment	Don Herzog	4.00			
LAW	780	001	Human Rights: Themes and Var	Steven Ratner	3.00			
LAW	893	001	Presidential Powers	Chad Readler	2.00			

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
801 Monroe Street, 945 Legal Research
Ann Arbor, Michigan 48109-1210

Ted Becker
Director Legal Practice Program
Clinical Professor of Law
tbecker@umich.edu
(734) 763-6025

June 04, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Elizabeth ("Betsy") Sheppard's application for a clerkship in your chambers. I know her well, and think so highly of her abilities that I have asked her to be one of my student assistants next year. Based on my knowledge of her academic abilities and work ethic, I am extremely pleased to recommend her. Betsy was a very capable student in my class, and I have absolutely no reservations about recommending her for a clerkship.

First, as to Betsy's legal abilities, I had the pleasure of working with her in the 2021-22 academic year in my Legal Practice course (as well as an ungraded "1L mini-seminar" in the winter semester called "Abraham Lincoln and Legal Ethics"). Legal Practice is a full-year course that introduces first-year law students to numerous experiential skills, such as common types of research and writing assignments that they will likely be asked to produce as practicing attorneys. The first semester emphasizes objective analysis of simulated client problems, as well as communicating that analysis to a senior attorney in a way that a legal audience would likely expect. The second semester switches focus to advocacy and other lawyering skills. Students meet individually with me on numerous occasions to discuss my comments on the drafts of their written assignments and how they might revise them so that they correspond with what a legal reader will likely expect.

Betsy was a genuine pleasure to have in class and to talk with outside of class, and her work was top notch. She received Honors in the course at the end of the year (limited to the top 20%). As that result might suggest, she consistently received high marks on all assignments, such as tying for the second-highest grade on the rewrite of her closed memo (the first major writing assignment of the first semester) and her pretrial and summary judgment briefs (the two major writing assignments in the second semester). Her legal research was thorough and effective, and she smoothly made the shift from objective analysis to advocacy. In short, Betsy consistently exceeded my expectations and her writing, analytical, research, and other skills were definitely above the norm for a first-year law student at that point in her legal career.

I met with Betsy individually on numerous occasions during office hours and as part of the mandatory conference process for various assignments. As mentioned above, I much enjoyed these discussions: she was professional, she took the assignments seriously and wanted to increase her proficiency as a legal writer because she knew how important that would be in her career, and she put in the effort to make that happen. I didn't have to tell her things twice; she recognized without prompting when comments or suggestions I might have made on an earlier assignment remained applicable for later projects (this is something that many 1Ls in my experience have difficulty mastering). In sum, she brought a "real world" approach to my course, and that showed in the quality of her work product.

I was so impressed with Betsy's performance in my course that, in my capacity as Director of the Legal Practice Program, I asked her to be one of the "senior judge" student assistants for a newly hired professor during the current academic year who did not have previous students of his own to tap as assistants. Among other things, upper-level student assistants in Legal Practice review student papers, hold office hours, and serve as mentors for 1Ls, so a strong work ethic and winning personality are a must. As I expected, Betsy did an exemplary job for the other professor, and I am pleased that she then accepted my offer to serve as one of my assistants in the upcoming year. As part of her duties, she will be preparing a writing assignment for my class use in a following year. This will require her to create the facts of the problem, conduct the research necessary to find all relevant cases, refine the problem as necessary in light of what the research shows, and then prepare the assignment materials. I look forward to working with her next year on this project.

In summary, based on Betsy's demonstrated level of performance in my course, I have no doubt that she has what it takes to make an excellent judicial clerk. I believe that her analytical and writing abilities will make her a valuable resource for you. The abilities and work ethic she's demonstrated in my class and as a student assistant for the Legal Practice Program leave me no doubt that she will succeed.

I would be happy to discuss Betsy's qualifications and background in more detail. Please do not hesitate to contact me at the above-listed phone number or email address.

Ted Becker - tbecker@umich.edu - 734-763-6025

Sincerely,

/Ted Becker/

Edward R. “Ted” Becker
Director Legal Practice Program
Clinical Professor of Law

Ted Becker - tbecker@umich.edu - 734-763-6025

MICHIGAN LAW
UNIVERSITY OF MICHIGAN
701 South State Street
Ann Arbor, MI 48109-3091

JULIAN DAVIS MORTENSON
James G. Phillipp Professor of Law

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of my student Betsy Sheppard's application for a clerkship in your chambers. Betsy is a smart, dedicated, and engaging law student who has a natural talent for getting along with people. She'd be a great clerk, not only as a substantive contributor to the legal work of the chambers, but also as a thoughtful, constructive, and positive colleague.

I first got to know Betsy as a student in a 45-person section of constitutional law during her first semester on campus. Because the section was so small, I got to know the students especially well, and Betsy certainly stood out as someone who was a pleasure to get to know as a student and as a future lawyer. She was a bold and highly constructive participant in classroom conversation, always willing to participate and to take a risk on being wrong as part of the process towards getting to an understanding. I really admired that about her approach, especially since so many law students can be reluctant to explore ideas at first without being confident they completely understand the problem or are certain about the answer. Her willingness to engage in the process of working through hard ideas even in the face of uncertainty makes for a highly collaborative approach to classroom learning; it's really distinctive.

As an intellectual matter, Betsy has a highly pragmatic streak that's exceptionally useful in classroom discussion (not to mention in the work of lawyering), and that often characterized her interventions and our exchanges over the course of the semester. She'd raise her hand about some doctrinal distinction, meticulously and accurately summarize the substance of the point at issue, and then ask a version of the question: "why does this make a difference to people on the ground?" Sometimes it would be in reference to the way the same physical fact can present differently depending on what (invisible and only inferentially demonstrated) mental state you attribute to the actors in the legal problem. Other times it would be about the way that some event can easily be reframed to fit on one side or the other of a given legal test (her discussion of the Stafford Rate Cases from the commerce clause stands out in my memory in this regard). These questions were always posed with a precision that evidenced full familiarity with the black letter formulations—certainly it's not that she didn't take the doctrine seriously. It's that she took the first step (of understanding the doctrine), but then also was persistently interested in the second step: "do these formal differences make sense in a way that matters to something real?" It was great stuff from a first semester 1L.

Betsy's writing is very good and thoroughly reflects her strong analytical grasp of the legal materials she works with. Certainly her email communication with me has always been crisply expressed and substantively on point. And her Con Law exam was similarly well written, with nice execution of communicative structure at both the sentence and paragraph levels. Her unpretentious, focused style serves her as well in written communication as it does in personal discussion.

After law school and after clerking, Betsy plans to go into litigation. She's especially interested in trial work; her work in Michigan's Civil-Criminal Litigation Clinic whetted her appetite for on the ground work at the stage of developing cases, building records, and laying legal foundations—she finds the wide range of open-ended strategic thinking especially appealing. Her smarts, her level head, and her doctrinally-informed pragmatism will serve her well as a litigator in the long run in much the same way as they will help her be an effective law clerk in whatever chambers she ends up in.

Long story short, Betsy is terrific. Please don't hesitate to reach out to me if you have any questions; I'd be pleased to speak with you further on her behalf.

Best regards,

Julian Davis Mortenson

Julian Mortenson - jdmorten@umich.edu - 734-763-5695

June 04, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is with great enthusiasm that I write this recommendation for Elizabeth ("Betsy") Sheppard. Betsy was my student during the Fall 2022 semester in the Civil-Criminal Litigation Clinic ("CCLC") at Michigan Law. The CCLC is a general litigation clinic in which law students work in teams of two on a variety of civil and criminal legal matters. I supervised Betsy's case work and taught her in the seminar component of the clinic. She performed with excellence in all aspects of the course. Betsy is smart and highly competent, while also being refreshingly straight forward and unpretentious. I have no doubt that she would be an excellent judicial clerk.

I supervised Betsy and her partner on an eviction matter and a sentence commutation case. In both cases, Betsy did top notch work. From early in the semester, I had the utmost confidence that Betsy was on top of all developments in her case work and that nothing would fall between the cracks. In the eviction matter, I was able to observe Betsy's oral advocacy in court and in negotiations with opposing counsel. She projected more confidence than she perhaps felt, such that it would have been hard for anyone to tell that this was her first court appearance and her first real-world negotiation. The case took far longer to resolve than it should have, due almost entirely to foot-dragging by the other side. Betsy did a great job pushing and prodding when necessary to keep things moving along, while never losing her cool despite a great many frustrations. She also engaged in effective client counseling, appropriately expressing empathy for her client's situation and advising her about her options.

I was also impressed with Betsy's written advocacy in the commutation case. She and her partner put together an elegantly written and compelling commutation application on behalf of their client. They showed their client great compassion despite his past offenses, and were able to build on that to write an effective narrative on his behalf. The first draft of the petition was already impressive, and it got better from there because of Betsy's ability to incorporate feedback effectively. Betsy worked well with her clinic partner, despite significant personality differences, showing appreciation for her partner's strengths and patience for his quirks.

Betsy was also a very active participant in the clinic seminar. She was always willing to contribute to class discussion but never dominated. Her comments were thoughtful and consistently enriched the conversation. Betsy performed strongly in the mock trial that is the capstone experience of the clinic seminar. It was clear that she prepared carefully and put a lot of thought into her trial strategy. As throughout the semester, she took feedback on her trial performance without a hint of defensiveness, which is not such an easy thing to do in that setting.
In sum, I have no hesitations in recommending Betsy for a position as your clerk, and I urge you to give serious consideration to her application.

Sincerely,

Mira Edmonds
Clinical Assistant Professor of Law

Mira Edmonds - edmondm@umich.edu

Elizabeth (Betsy) Sheppard

3009 Park Avenue, Lafayette Hill, PA 19444
(484)-213-6701 • eshep@umich.edu
She/Her/Hers

WRITING SAMPLE

I wrote this brief for the University of Michigan Law School's flagship moot court competition, which involved a fictional case, *Sutherland Bank v. Consumer Financial Protection Bureau*. This case raised two main questions. The first concerned the right to a jury trial in administrative proceedings, and the second concerned presidential removal power over executive officers. This brief is a writing sample of my own work, and it has not been edited by others.

Elizabeth (Betsy) Sheppard
Writing Sample

STATEMENT OF THE CASE

A. Introduction

Petitioner H.B. Sutherland Bank, N.A. (the Bank) brings this appeal from the Twelfth Circuit and raises two arguments. *H.B. Sutherland Bank, N.A v. Consumer Fin. Prot. Bureau*, 505 F.4th 1, 1 (12th Cir. 2022) (en banc), *cert. granted*, No.22-0096. First, the Bank alleges that its Seventh Amendment rights were violated when an administrative law judge at the Consumer Financial Protection Bureau entered judgement against the Bank for engaging in deceptive practices in violation of the Consumer Financial Protection Act. *Id.* at 2; 12 U.S.C. §§ 5531, 5536. Next, the Bank alleges that the removal protections for administrative law judges within the Consumer Financial Protection Bureau violate the separation of powers. *Sutherland Bank*, 505 F.4th at 2. Both of these arguments lack merit.

B. Statement of Facts

Following the 2008 financial crisis, approximately four million American families lost their homes to foreclosure. Fin. Crisis Inquiry Comm'n, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, xvxvi–vii (2010), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [hereinafter Fin. Crisis Inquiry Comm'n Final Report]. Another four million fell behind on rent and mortgage payments. *Id*. Congress, recognizing that "[t]he collateral damage of this crisis ha[d] been real people and real communities[,]" *id.*, passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010). Through this act, Congress created the Consumer Financial Protection Bureau (the Bureau), entrusting it with the enforcement of eighteen preexisting federal consumer protection statutes and empowering it to enforce an added prohibition on unfair, deceptive, or abusive acts and practices (UDAAPs) in the consumer finance sector. *Id.*; 12 U.S.C. §§ 5531, 5536.

Sutherland Bank, which operates in this sector, takes issue with this enforcement power. *Sutherland Bank*, 505 F.4th at 2. The Bank and its subsidiaries provide retail banking, stock brokerage, insurance, and wealth management services to over eleven million customers throughout the country. *Id*. at 2–3. While providing these services, the Bank committed a plethora of consumer protection violations for which the bureau brought an enforcement action. *Id.* An administrative law judge (ALJ) heard the case, and made the following legal and factual findings. The specific facts underlying the violations are not in dispute. *Id.* at 6.

First, the Bank enrolled customers in its Account Protection Program (APP) overdraft-protection service without their consent, for which the bank charged overdraft fees in violation of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r. *Sutherland Bank*, 505 F.4th at 6. Additionally, the Bank failed to establish and implement reasonable written policies and procedures concerning the accuracy and integrity of information that the Bank furnished to nationwide consumer reporting services, which violated the Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x. *Sutherland Bank*, 505 F.4th at 6.

Lastly, the Bank engaged in deceptive acts and practices both in-person and over the phone in violation of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531(a), (d)(1), 5536 (a)(1)(B). The Bank made false statements and misrepresentations to its customers. *Sutherland Bank*, 505 F.4th at 6. Specifically, the Bank told customers that they were not being assessed fees on their accounts, even though the accounts were automatically enrolled in the APP service, which assesses fees. *Id.* at 5. The Bank also advertised accounts to potential buyers as having no mandatory fees, despite the automatic enrollment in the APP service. *Id.* The Bank now asserts a separation of power claim and a Seventh Amendment challenge, but it asserts the Seventh Amendment only in regards to the CFPA. It concedes that both the Fair Credit Reporting Act and